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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1962

No. [redacted] 169

LUTHER ROBINSON MADDOX,
Petitioner,

v.

FIDELITY INVESTMENT & TITLE CO., INC., and JAMES C. CHRISTOPHER, As Secretary Thereof and Individually; F. ARCHIE MEATYARD, JR., Individually and as Attorney for DISTRICT SUPPLY, INC., ET AL.; OWEN E. OSBORNE, RAYMOND O. SHROYER and MARY K. SHROYER, his wife,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND APPENDIX

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Dated: June 11, 1962

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Petitioner, Luther Robinson Maddox, prays that a writ of certiorari issue from this Court to review a judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled cause on March 5, 1962, affirming the judgments of the trial court. A motion for a rehearing was duly filed by Petitioner on April 3, 1962, and it was denied on April 12, 1962. (R. 136-141, 142-145).

OPINIONS BELOW

The Opinion of the Court Below is officially reported in 300 F. 2d, 1 a copy of the opinion served upon Petitioner is annexed hereto as Appendix "A"; the opinions of the trial court are shown as Appendix "B" and "C" (R. 43-53, 57-69). The opinion of the Court of Appeals of Maryland, September Term, 1959, No. 151, is reported in *Maddox v. District Supply, Inc., et al.*, 222 Md. 31, 158 A. 2d 650, and it is also shown in Appendix to the Petition for a writ of certiorari, to that court as Exhibit "B", p. 45, filed by Petitioner in this Court on August 17, 1960, October Term (No. 330). In that same Appendix is shown, also, the opinion of the Montgomery County Circuit Judge (Eq. No. 17,356), pursuant to which the consent judgment was affirmed by that Maryland Court of Appeals, the court of last resort in that State. This Court refused to review that Maryland Court's decision; and, when application was made for a reconsideration and review, duly filed on November 18, 1960, that was denied also (December 5, 1960). The Maryland Court of Appeals was also asked to reconsider and rehear that case, affirming the consent judgment below as rendered against the Shroyers, but that was denied (4/19/60). That motion however, was duly filed on April 14, 1960, and its decision and opinion was published in the Atlantic Reporter five days before the motion for reconsideration and rehearing was filed (See p. 52, Appendix, Exhibit "C"—October Term, 1960, No. 330).

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1254(1) and pursuant to Rule 19 of this Court where (1) the court below has decided a case in conflict with decisions and principles of law laid down by this Court and other Circuit Courts of Appeals—even contrary to the principles established in its own Circuit; (2) and where it has decided important questions of law involving the Federal Rules of Civil Procedure that should be settled by this Court; (3) and where it has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the trial court, as to call for the exercise of this Court's power of supervision; (4) and, further, where it has decided federal questions in conflict with applicable decisions of this Court and well-established law.

The trial court took jurisdiction under 28 U.S.C., Section 1391(a) (diversity of citizenship).

QUESTIONS PRESENTED

1.—Whether the Court of Appeals erred:

(a) When it held there was not a "shred of evidence to support plaintiff's charges" of a malicious conspiracy to breach contracts of employment existing between Plaintiff and the Shroyers, thereby defeating, depriving and defrauding Plaintiff in the trial court out of fees earned and to be earned (R. 137, 138; O/R. 48, 49), as charged in COUNT FOUR: and, further, of breaching an implied warranty under Assignments of an escrow fund being held by the Title Company, and nullifying a Power of Attorney, where both the Power of Attorney and the As-

signment were *one contract* between the Petitioner and the Shroyers, having been executed in 1955 by the Shroyers to secure Plaintiff's fees under said contracts of employment; and, further, to commit a malicious and unlawful abuse of legal process upon the plaintiff below, Petitioner herein; and moreover, to maliciously and illegally convert funds in escrow;

(b) when it lumped COUNTS, FOUR, FIVE and SIX, together, in its opinion, when COUNT FIVE (O/R. 468-481) as amended on April 14, 1961, (Fiat on margin thereof), charging Title Company and its Secretary, James C. Christopher, Raymond O. Shroyer and his wife Mary, in a tort action, for conspiracy to maliciously and illegally convert—and did convert—the escrow fund of $17,000.00 to their own advantage and profit, and to pay it out accordingly, working in concert and collusion with others, and then to hold and say there was no legal evidence to support such a charge (R. 89-125);

(c) when it held in effect that the trial court was right when it refused to grant Plaintiff a Summary Judgment on COUNT SIX against Meatyard when he (Meatyard) had not answered the COUNT and there was *no issue* before the trial court on that count (R. 69, 70), and the trial court had directed a verdict for all the defendants on COUNTS FOUR, FIVE and SIX, and when the case had been finished under pressure and was ready to go to the jury under *a directed verdict*, and then after verdict recorded by the Clerk, without any issue joined on that Count Six by Meatyard, permitted him to file an amended answer to that Count, (see Apx. to Br. pp. 93-96, R. 69-72);

(d) when it said, and held, "We are not faced with

the question of whether there was conflicting evidence. Here there was no evidence to justify the accusation of unlawful action. Neither was there any probative evidence of an illegal conversion" (R. 138);

(e) when it refused to discuss and consider, and pass on, the "thirteen questions" covering errors set out in Petitioner's Brief filed in the Appellate Court, and which errors were contended committed by the trial court, and further said it "would not be fruitful" to do so (R. 138);

(f) when it held, and stated, Plaintiff "has had the benefit of a careful and considerate trial judge who conducted the trial according to the highest tradition of the judiciary. The obligations that American justice owes to every litigant have been fully satisfied. The Shroyers attempted to discharge the plaintiff some five and a half years ago; they are now entitled to their peace. *The judgments of the lower courts are affirmed.*";

(g) when it held in effect that the trial court, in directing a verdict on COUNTS FOUR, FIVE and SIX, it was proper for that court to pass on not only the credibility of witnesses but also on inferences of fact to be drawn from facts well established in the testimony and documentary evidence, all of which was basically the jury's function;

(h) when it held in effect, positively, that Plaintiff had been afforded a fair and impartial trial in that trial court, and had had "his day in court", when five days were allowed Plaintiff on COUNTS ONE, TWO and THREE, for breach of contracts against the Shroyers alone, and then allowed Plaintiff only two days for his conspiracy counts

(4, 5, 6), which reasonably, at least, should have taken another week, for the broadest latitude is allowed on evidence, ordinarily.

2.—Whether Petitioner was denied due process of law and a fair and impartial trial in the trial court; and in effect by affirming the trial court's rulings, generally, the Court of Appeals had committed error based on the complete record itself before it?

3.—Whether Petitioner was afforded a fair and impartial trial in the trial court by an eighty-eight year old Judge, who had been retired for many years, but still on the Bench; and who allowed five days on the first three counts but rushed Plaintiff through the last three counts (conspiracy charges) in two days, when witnesses had been summonsed, under subpoenas, and served, for the next two days thereafter (R. 84)—and refused to continue case?

4.—Whether the record itself shows that the Court of Appeals accepted substantially, if not *verbatim* in places, the arguments and statements of counsel for appellees, in their briefs, and as made in the Court of Appeals of Maryland, for their decisions and conclusions (see Opinions and briefs)?

5.—Whether the Court of Appeals of Maryland ever had jurisdiction of that equity case (No. 17,356) when it handed down its opinion and judgment of 1960, affirming the consent judgment of Judge Pugh's for $11,500.00 against the Shroyers, when no agent had been appointed by the District Supply on June 30, 1955, nor when it filed its equity suit originally, on May 25, 1954?

6.—Whether a verdict of $2,125.00 as brought in by the Jury on Counts One, Two and Three, (for breaches of employment contracts was reasonable and sufficiently fair (345 days of eight hours each), over a period of two and a half years, would not shock the conscience, generally, of most fair and reasonable minded men in the legal profession (see p. 20, Ap. Br.)?

7.—Whether the Federal Rules of Civil Procedure have not been violated and flouted in the trial court, in the proceedings therein, and such action or inaction ignored by the Court Below when it affirmed the judgment of the trial court, thus reversible error committed by it?

8.—Whether Plaintiff in the trial court was entitled to a verdict and judgment against the Shroyers and Osborne, on the face of the record, under the conspiracy charges alone, aside from all other defendants, for breach of the contracts?

9.—Whether it was reversible error for the jury to pass on counts 1, 2 and 3 on breach of employment contracts when it did not have with it for study and examination the complete amended complaint on these counts, including such written contracts, which were part and parcel of that complaint?

10.—Whether the Court Below erred when it refused to rehear and denied Petitioner's application for a Rehearing, under date of April 12, 1962, and refused to stay MANDATE under the allotted time of ninety days from date of such denial (April 12, 1962, R. 145)?

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, ETC., INVOLVED

The pertinent portions of the Constitutional provisions, Statutes and Federal Rules of Civil Procedure, are set out as Appendix D.

STATEMENT OF THE CASE

The Amended Complaint herein filed in the District Court, hereinafter called the "trial court", in Counts 1, 2, 3, 4, 5 and 6 (O/R. 40-52, 54-58, 468-471) charged the respondents, basically, with a conspiracy to breach employment contracts, existing between the Shroyers and Petitioner, in order to get Petitioner out of such employment as the Shroyers' attorney and in order that the District Supply, Inc., and others, might settle all matters with the Shroyers on their own terms (R. 19-41). The District Supply, through its President, Charles Visek, a naturalized CZECHOSLOVAKIAN, had had some alleged difficulties with Raymond O. Shroyer, while Shroyer was a Vice President and employee of the District Supply from early part of 1950 to August 1953 (R. 133), and the Visek family holding the majority stock in that Pennsylvania Corporation, doing business in Maryland and having its Headquarters in the District of Columbia, pushed Shroyer out of the corporation as an officer therein, and wanted to keep him on as a mere employee (Trial Exhibit No. 1). Shroyer resigned in August 1953, and started at once his own business, dealing in buying and selling janitors' supplies, at 1911 Kenilworth Avenue (just over the line in Maryland from the Northeast section of Washington). This was a competitive organization, known as the Ray Supply Company, and it was taking away from the District

Supply a substantial amount of business—tragically so, according to the record in *Exhibit No. 1, supra.*

So, on May 25, 1954, the District Supply filed an equity suit in the Montgomery County Circuit Court, Maryland, against Raymond O. Shroyer and Mary K. Shroyer, his wife, charging them with illegal conversion of funds while he (Shroyer) was an officer and employee in the District Supply, claiming that some $22,000.00 had been illegally converted, and asking in that suit that the Shroyers be enjoined from selling their home in that County, and for other relief (O/R, in Trial Exhibit No. 1), claiming it had a right to file the suit. The Shroyers had advertised this home for sale. It was jointly owned. Hence, pursuant to such action by the District Supply, through its President, it made further charges with the District Attorney for the District of Columbia, about August 1954, against Shroyer for embezzlement of funds, which was covered in some details in the pleadings, and papers filed, in that civil suit (Eq. No. 17,356), and it obtained an indictment against Shroyer on July 16, 1956, on the basis of probable cause for embezzlement in an amount of some $6,000.00, which indictment and criminal suit (No. 713-56) was dismissed under date of February 11, 1957, for want of evidence and failure to prosecute by District Supply, through its President, Charles Visek (R. 30-32).

Under date of April 5, 1954, Raymond O. Shroyer retained Petitioner as his attorney to represent him, in all his matters in controversy with the District Supply and he stated to Petitioner, at that time, that the situation portended ominous and tragic results, involving threats of a most serious nature against him, allegedly having been made by the District Supply, through its President,

and its Attorney, Richard W. Galiher, a resident of Maryland. After the civil suit was filed against Shroyer and his wife, both came to Petitioner and engaged him as their attorney, in a written contract under seal, to defend the civil suit against them, and stated they wanted it fought aggressively, in such defense, to the "bitter end", in order to "wash away any smear, blot or stain, that might attach or be placed upon them and their names by the District Supply, and others, by such charges".

Soon thereafter, the embezzlement charge became active, about August 23, 1954, and the District Attorney requested Shroyer to come into his office, and explain the situation. Petitioner was then engaged to defend Shroyer in that matter and a written contract was executed for that employment; his wife Mary became a guarantor on that contract (R. 21-23).

Thereafter, the Ray Supply Company that Shroyer had formed, about September, 1953, was becoming financially embarrassed and Shroyer engaged Petitioner to represent that organization (R. 23-25), in order to secure any relief possible while the civil suit in Maryland was under way and the criminal charge was brewing in the District of Columbia. Mrs. Shroyer was guarantor on this written contract of employment. By that time, the Ray Supply Company had become a partnership (Shroyers 60% and James Lewey Caraway and wife Celia, who resided in Virginia, 40% owners). The record shows that in the meantime, the District Supply, through its officers and agents, and others, were spreading around slanderous statements, in order to destroy Shroyer's business, if possible, the Ray Supply Company, a serious competitor: Namely, that Shroyer had embezzled funds of the District Supply, while he was

connected with that corporation, and that he was going to jail for it. Hence the creditors of that partnership firm were pressing it hard for payment of bills overdue.

The first three Counts of the Amended Complaint were against the Shroyers for a breach of the written contracts of employment; Count Four was against all Respondents herein charging a malicious conspiracy hatched to breach these contracts of employment, and thereby to deprive, defeat, cheat and defraud Petitioner out of fees earned and to be earned. And, further, to breach an implied warranty under Assignments and Power of Attorney covering a chose in action (R. 26-29), and to commit a malicious abuse of legal process against the Petitioner. Count Five charged, as Amended, the Shroyers, Title Company and Christopher, its Secretary, with a malicious conspiracy to convert illegally the escrow fund over which Petitioner held a Power of Attorney and the Assignment of the $17,000.00 to secure his fees, and a special assignment of $500.00, approved and executed by Christopher on September 13, 1954 (R. 26-29).

When the escrow fund was created and the District Supply filed its equity suit on May 25, 1954, against the Shroyers, and the District Supply had no standing, nor right, to file such a suit, or any suit against anybody, in Maryland, and that Circuit Court had no right, nor power, to entertain such a suit, or any suit for the District Supply. It was a fraud on the Court. That corporation was doing business at that time in Maryland; not only foreign business, but also intra-state and inter-state business; yet it had no agent appointed to represent it as required by the Code of Maryland (1957 Ed. Md. Code, anno., Art. 23, Sections 90 and 91(c), R. 142(7). Nor did it have an

agent appointed on June 30, 1955, when the Shroyers' demurrer for the second time, against the Amended Complaint of that corporation, was argued before Judge Anderson, and he took it under advisement, and did not pass upon it until January, 1956 (Trial Exhibit No. 1). The Amended Complaint, so-called, was filed by that corporation about November, 1954.

Moreover, when Judge Anderson did not pass upon the demurrers and other matters argued before him, in that equity suit against the Shroyers, on July 31 and August 6, 1956, nor other matters argued before him in 1957 (March 20 and May 25), where Rules to Show Cause had been issued against this Petitioner, he went away on vacation in 1959; and the equity case was transferred and assigned to another Judge for a Reargument and a Rehearing, over Petitioner's strenuous objection, and Judge Pugh (the newly assigned Judge) entered a consent judgment against the Shroyers for $11,500.00 and costs of suit, in 1959, from which decision Petitioner appealed as an intervenor to the Court of Appeals of Maryland. Judge Pugh's consent judgment was affirmed by that Court of Appeals, a Rehearing was asked for and that was denied Petitioner, from which final judgment an application was made to this Court for a Writ of Certiorari in order that this Court might review the final action of that State Appellate Court (See October Term, 1960, No. 330, Petition for Writ of Certiorari, Maddox v. District Supply et al.). That application was denied by this Court, and a Reconsideration and a Rehearing thereon, also, was sought but that was denied (December 5, 1960). Petitioner was discharged by the Shroyers on September 15, 1956, as the result of the conspiracy charged in Count Four.

The trial court in this case directed a verdict for all defendants on Counts 4, 5, 6, which were tort actions, and stated there was no legally sufficient evidence to go to the jury. The Court Below, in its Opinion, said there was not a "shred of evidence" to go to the jury, making the matter absolute so far as Petitioner's situation was concerned. Hence, that is the basic question before this Court, whether or not the Court Below erred, when the entire record was before it?

When the trial court directed a verdict to the jury in favor of all defendants, on Counts Four, Five and Six, there was no issue joined as to Meatyard, at that time on Count Six. Then, after verdict was returned by jury and recorded by the Clerk of Court, Judge Chesnut allowed Meatyard to make answer such as it was, and amend (R. 69-72). Plaintiff had previously made an oral motion for summary judgment against Meatyard on this Count Six, but it was denied (R. 70).

A motion to set aside and vacate judgments entered of record in the trial court was duly filed and argued before Judge Chesnut, but motion was overruled. Thereafter, an appeal was duly noted in the Trial Court, the matter was argued in Court Below and trial court's ruling and decisions affirmed. A motion was made in the Court Below for an extension of time within which to make Petitioner's oral argument, but no record was made of that Court's denial. It was denied, however. Petitioner contended in that motion that due to the voluminous record in this case and the complications involved, it could not be argued properly in less than three hours, as requested. (R. 128). Hence, Petitioner is now here before this Court asking for a writ of certiorari to review the judgment and erroneous

rulings of the Court Below, in a last effort of endeavor to obtain justice, under the facts and well-established law involved. The Mandate in the Court Below was asked to be stayed until this Court could finally determine these matters before it, but it was stayed only for 30 days, then for 30 days further depending on whether or not Petitioner made his application for a writ of certiorari within that time (R. 145). See 28 U.S.C., Sec. 2101(c) and (f).

REASONS FOR GRANTING WRIT

I.—Rule 19 of this Court suggests a Writ of Certiorari may be granted where there are special and important reasons therefor shown: (1) Where a Court of Appeals has rendered a decision on the same matter in conflict with another Court of Appeals and where a Court of Appeals has decided a federal question or questions in conflict with applicable decisions of this Court; (2) where a Court of Appeals has decided an important question of federal law that has not been but should be settled by this Court; and (3) where such Court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by the lower court, as to call for an exercise of this Court's supervision.

A

The Court Below has decided in the instant case and rendered a decision contrary to other Courts of Appeals—and even contrary to decisions in its own Circuit as well as foundationally well-established law. The Federal Rules of Civil Procedure have been flouted and ignored by the trial court and the Court Below has approved such practice

and procedure. The matter involved in the trial court was fundamentally a conspiracy case and evidence consisted mainly of letters and documents, supplemented by testimony of hostile witnesses who had written these papers and documents, and other conspirators not named as defendants in the case. The Shroyers, Meatyard and Galiher, with Christopher and Osborne, naturally denied their unlawful connection with each other, so far as they were working in concert to bring about a breach of employment contracts, an implied warranty under assignments and a Power of Attorney, to commit a malicious abuse of legal process against Petitioner, and to commit, maliciously, an illegal conversion of a chose in action known as the escrow fund, held by the Title Company of which Christopher was Secretary. Such evidence and testimony as was presented by the Petitioner in the trial court on Counts Four, Five and Six involved serious angles of credibility of witnesses and conflicting inferences of fact that might be drawn therefrom. The trial court undertook to, and did, pass on these conflicting inferences of fact and the credibility of these witnesses. Carlin and Meatyard were partners in the practice of the law at Bethesda, Maryland, and had been for many years; Meatyard, Galiher, and Christopher, were closely associated there at Bethesda in their law offices. Galiher was located in Meatyard and Carlin's office as a practitioner in Maryland (Montgomery County). Hilland was never found by the Marshal, although he was called for under two *subpoenas duces tecum*. Mack was never found either, although called for under two *subpoenas tecum*. The trial court in its instructions to the Jury, when a verdict was directed for all the defendants on Counts Four, Five and Six, commented on the fact that Hilland had not been called to testify. Hilland, Meatyard and Christopher had know each other for some thirty

years in that County, and Hilland conducted a law office too, at Rockville.

In *Connally* v. *Gishwiller* (7CA, 1947), 162 F. 2d 428, it was said, at p. 433 (R. 142, pp. 2, 3):

> "A conspiracy is nearly always from the nature of things, provable only by circumstantial evidence, by inferences reasonably deduced from proven facts. It may be inferred from the nature of the acts complained of, the individual and collective interests of the alleged conspirators, the situation, the intimacy and the relations of the parties at the time of the commission of the acts, and generally all the circumstances preceding and attending the culmination of the claimed conspiracy."

In *Sartor* v. *Arkansas Gas Corporation* (1944), 321 U.S. 620, at p. 628, this Court said:

> "*** the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact."

In *U.S.* v. *U.S. Gypsum Company* (1948), 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746, pp. 395, 396, this Court said:

> "The Government relied on, very largely, documentary exhibits and called as witnesses many authors of the documents. Both on direct and cross-examination counsel was permitted to phrase their questions in extremely leading form, so that the import of the witnesses testimony was conflicting. On

cross-examination most of the witnesses denied that they had acted in concert in securing patent license or that they agreed to do things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give little weight, particularly where the crucial issues involved are mixed questions of fact and law. Despite the opportunity of the trial court to appraise the credibility of the witnesses we cannot under the circumstances of this case rule otherwise than finding 18 is clearly erroneous."

This *Gypsum Case* (CA, DC), in principle is almost exactly like the instant case, except there was no jury; it was a three Judge panel below. However, so far as the testimony of Meatyard, Christopher and Osborne, and the Shroyers, are concerned, it is in conflict, directly, not only from the proof itself from the documentary standpoint but from conflicting inferences of fact to be drawn therefrom—and their testimony. Hence, the above two cases should be controlling, basically, in the instant case.

Hilland, Mack, Meatyard, Galiher, Carlin, Christopher, McInerney, were residents of Montgomery County and practitioners of the law therein. Carlin testified (Tr. Tr. 4/24/61, at p. 16) that Galiher had an office with him and Meatyard at Bethesda, Maryland; the testimony of Meatyard (R. 142, p. 2) shows the Court asked him a question as to what he knew about Galiher and how he was connected with him, and his answer was "No, sir, he forwards us cases on occasions" *** Then Meatyard testified (R. 114), when pressed, that *he would not deny* Petitioner talked to him over the telephone about October 1, 1956, concerning the status of the equity suit, but his testimony in

a deposition taken in the District of Columbia in the Companion Case that the trial court refused to be used in this case in Baltimore at the trial, shows that he said this telephone conversation was a "fabrication". Then, Meatyard testified that he had only a few conversations over the years, just casually, with his old friend (Christopher) of some thirty years standing, but his answer to an Interrogatory in this case on that same question (Rule 33) says "innumerable times" they must have discussed these matters. Christopher testified to the same effect. These are just a few examples showing conflicting facts that make Meatyard's testimony, coupled with his papers that he signed in the record, which not only involve conflicting inferences of fact, but credibility, which the trial court could not pass on, under well established law. An analysis of his testimony that is in the certified record (pp. 92-125) will undoubtedly emphasize that statement. And, at p. 116 the trial court said:

> "I will let him answer, if he wants to, but I will not allow a long debate about the effect of the opinion of the Maryland Court of Appeals, to any circumstance there at all, and (as) it has nothing to do with this particular case, so far as I can see."

But, it will be noted that, in the Opinion of the *Court Below*, the case in the Maryland Court of Appeals was made basic (also, the trial Court's opinion), although one of the Judges at the hearing thereon, in Richmond, Virginia, on January 9, 1962, made the same statement as the trial court, in effect, if not in those exact words.

B

These defendants naturally denied, in effect at least, as such conspirators that they were aiding and abetting the Shroyers in arriving at a conclusion for the purpose of breaching contracts of employment between Petitioner and his former clients, to bring about the breach of an implied warranty under assignments and Power of Attorney, with full control over an escrow fund of $17,000.00; and, further, to convert illegally and maliciously such escrow fund to their own use and behoof; and, further, to maliciously commit an abuse of legal process against this Petitioner. The trial court passed upon the multitudinous conflicting inferences of fact, involved in the record, and, then went a step further to pass on the credibility of these witnesses, and ruled that their depositions taken in the Companion Case in Washington, D.C., could not be used in the trial of this case, which would have substantially shown these defendants' testimony, as a whole, unbelievable. When the trial court directed a verdict on Counts Four, Five and Six, and stated there was no legally sufficient evidence to go to the jury, if not only passed on conflicting inferences of fact but also the credibility of these witnesses—Judge Chesnut also stated at one phase of the case, when Petitioner referred to the *Gypsum Case, supra*, as controlling in a great measure, that case was inapplicable and did not apply; it was a Government Case anyhow. The Court Below, however, went a step further and said:

> "Nowhere does there appear a shred of evidence to support the plaintiff's charges." (R. 137)

The record shows the contrary, and such facts as were

presented, with all the conflicting inferences of fact, and the credibility of witnesses, should have gone to the jury, under proper charges. The test here would be: If the case had gone to the jury under a proper charge, would the Court Below have been forced to set aside the verdict of the jury, if it had brought in a verdict for the Petitioner (Plaintiff therein)? See Petition in Court Below, of Petitioner, filed 4/3/62, asking that Court for a Rehearing, etc., and setting forth the well-established law on the subject involved (R. 142-144, pp. 1-18). In *Calcutt* v. *Gerig* (6CA, 1921), 271 Fed. 220, 27 A.L.R. 543, it was held: Where credibility of witnesses is involved, case must go to the jury; and in the *Gypsum Case*, supra, it was held, where the entire record shows error, the case should be reversed. In the *Tennant Case*, cited in the *Lavender Case*, Opinion of the Court Below (R. 136), this Court said (p. 35):

> "It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witness *** and draws the ultimate conclusions as to facts. The very essence of its functions is to select from among conflicting inferences and conditions that which it considers most reasonable."

In *Dodson* v. *Imperial Motors, Inc.*, (6CA, 1961), 295 F. 2d 609, it was held: Weight to be given to testimony of witness, as well as their credibility, is for the jury. In *Byrne* v. *Shell Oil Company* (7CA, 1961), 295 F. 2d 797, it was held: Duty of jury to determine, and not the court, what the facts are. The jury is the fact-finding body (citing *Tennant Case*, cited in *Lavender Case*, Court's Opinion).

In *Hiscox* v. *Jackson*, 128 F. 2d 160, at p. 161, 75 U.S. App. D.C. 293, it was said:

"To pass from a directed verdict for plaintiff through the area of jury questions to a directed verdict for defendant requires very strong compelling evidence on behalf of defendant. It requires evidence which destroys all inferences and presumptions supporting plaintiff and which *raises no doubt against defendant*. Here, we believe that defendant's case is not so strong and plaintiff's so weak as to make a directed verdict for defendant proper. *** A reading of the four versions of the defendant and three of his witnesses reveal what might be considered inconsistent and self contradictions, and leaves some doubts as to absolute credibility of the witnesses—two typical jury functions. This in the light of the proposition that defendant's proof may be contradicted by his own evidence. We shall not go into details ***" (reversed).

In *Koninklyke Lucht Maatschoppig N.V.K.L.M. Etc.* v. *Tuller* (1961), 292 F. 2d 775, at p. 778, that court said:

"*** On motion for a directed verdict *** it is well settled that the evidence must be construed most favorable to the plaintiff; to this end he is entitled to full effect of every legitimate inference therefrom. If upon the evidence so considered reasonable men might differ, the case should go to the jury; if, on the other hand, no reasonable man could reach a verdict in favor of the plaintiff, the motion should be granted." (String of cases cited by Beger, J.)

In *Gulf, Mobile and Ohio R. Co.* v. *Thornton* (8CA. 1961), 294 F. 2d 104, at p. 107, that Court said:

> "Where inconsistent inferences reasonably may be drawn from the evidence, it is for the jury to determine which of the inferences shall be drawn."

C

The Court Below has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the trial court that it calls for the exercise of this Court's power of supervision. The Opinion of the Court Below (R. 131) has adopted and copied certain phrases and parts of Respondents' Brief almost verbatim in its opinion; it has laid its basis, obviously, on *Maddox* v. *District Supply, Inc. et al.*, 222 Md. 31, 158 A. 2d 650 (decided 3/15/60) and ignored the suggestion made therein about the Special Assignment of $500.00, executed by Christopher on behalf of the Title Company in September, 1954, at which time Meatyard testified he had not discussed with his old friend that Maddox represented the Shroyers—who could believe that? That $500.00 certainly should have been taken into consideration, if it considered the Maryland State Court case at all (R. 28, 29). The Title Company was bound by that paper writing of July 20, 1954, executed by Christopher, and approved, on September 13, 1954. Moreover, the record shows that amount was paid over to someone else than Maddox. That Maryland Court never had jurisdiction of that case, in the first instance, because the District Supply was a Pennsylvania Corporation, with Headquarters in the District of Columbia and doing business in Maryland, without ever having appointed an agent in that

State as provided by the Code of Maryland (Art. 23, Sections 90 and 91(c), 1957 Ed.). On May 25, 1954, when it filed that equity case, there was no agent, and when the Shroyers argued the demurrer on the So-called Amended Complaint on June 30, 1955, there was no agent appointed, yet the Chancellor took the matter sub judica in that equity suit and overruled the Shroyers' demurrer in January, 1956. (See Trial Exhibit No. 1). Lack of jurisdiction of a case can be raised at any time. The 1951 Edition of the Maryland Code contained the same requirement as the 1957 edition. See No. 330, October Term, 1960, in this Court, a Petition for a Writ of Certiorari to review that State Court Case, which petitioner was denied, also a Petition for a Rehearing in the Maryland Court of Appeals, shown therein as Exhibit "C", p. 52; the record numbers referred to therein are the same as shown in Trial Exhibit No. 1, deposited in this Court, for use in this case. Appellant's Brief filed in that case, shown in Trial Exhibit No. 1, on June 30, 1955, and Reply Brief later filed therein, shows that Court had no jurisdiction of the case in the first instances (222 Md. 31).

The Court Below, based on the holdings in that Maryland State Court, contended Petitioner had no rights under the Assignments and Power of Attorney, therefore, he was out of court and had had his day in court. The District Supply, however, was out of Court before it started, and was never in court. The Court Below failed to consider that fact and the Maryland Court of Appeals refused to consider it also; yet the entire record was before it—and now before this Court. (See R. 138) This fact alone shows such a departure from the usual and accepted course of judicial proceedings, or has so far sanctioned such a departure by the trial court, as to call for the exercise of this Court's

power of supervision and correction, in the interest of justice. The Exhibit "C" in that Petition for a Rehearing in the Maryland Court of Appeals, referred to above, filed in this Court in 1960, and referred to above, shows the well-established law in this Country on Assignments and Powers of Attorneys as are involved herein, dating back to John Marshall's day. It is requested, therefore, that this Court consider that Exhibit "C" in passing on this Petition and the law therein shown as covered in decisions of this Court (Filed August 17, 1960). See, also, Exhibit "A" attached to his Petitioner for a Rehearing in this Court (denied 12/5/60), showing moneys paid out by the Title Company.

D

The Trial Court said nothing about inferences of fact that might be conflicting, and how he treated those inferences, it will be noted, in his instructions to the jury—it merely said there was no legally sufficient evidence for them to consider (the Court Below said not a shred of evidence). That is especially significant. Now, in *Utica Mutual Insurance Co.* v. *State Farm Mutual Automobile Ins. Co.*, (4CA, 1960), 280 F. 2d 469, at p. 472, the Court Below said:

> "It is too well settled for argument, however, that where admitted facts reasonably permit *conflicting inferences*, it is for *the jury to draw ultimate inferences of fact*. Only where the proven facts do not reasonably support a favorable inference does the case become one for the court rather than the jury." (citing *Gunning* v. *Cooley et al.*)

In *Southern Fruit Distributors, Inc.* v. *Fulmer* (4CA, 1939), 107 F. 2d 456, the Court Below held: Courts are loath to invade the province of the jury. The Jurors are the sole judges of the fact, and no better method of deciding controverted facts has yet been devised in our system of jurisprudence.

It may be noted here with much significance that the Court Below does not follow its previous decisions and holdings.

In *Noerr Motor Freight, Inc.* v. *Eastern R.R. Presidents' Conference*, 155 F. Supp. 768 (affd. in 273 F. 2d 218) held: An unlawful conspiracy may be found without simultaneous action or agreement on part of conspirators, and that conspiracy is a matter of fact for the jury.

In *Morrison* v. *Texas Co.* (7CA, 1961), 289 F. 2d 382, it was held: If at all possible, appeals should be decided on the merits of the case.

In *Clemmons* v. *Board of Education of Hillsboro* (6CA, 1956), 228 F. 2d 853, at p. 857, that Court said:

> "*It is generally held that the trial court* abuses its discretion when it fails or refuses properly to apply the law to conceded facts or undisputed facts. *Union Tool Co. v. Wilson*, 259 U. S. 107, 112, 42 S. Ct. 427, 66 L. Ed. 848. Misapplication of the law to the facts is itself an abuse of discretion. *** Such abuse of discretion requires reversal."

In *Fritts* v. *Toledo Terminal R. Co.* (6CA, 1961), citing *Lavender Case*), 293 F. 2d 361, at p. 362, that court said:

"In other words, the question for this court is whether there was a complete lack of probative facts with respect to the matters here under consideration." (Reversed)

In *Schybinger* v. *Interlake Steamship Co.* (7CA, 1959), 273 F. 2d 307, at p. 312, citing *Gunning* v. *Cooley, Lavender and Tennant Cases*, said:

"Only where there is absence of probative facts to support conclusion reached (by jury) does a reversible error appear. The plaintiff's testimony was sufficient proof to take the case to the jury. There was conflicting evidence but it was a question for the jury." (Case here submitted to jury)

It is elementary law that evidence in a civil and criminal conspiracy case is, the same. It does not matter whether each defendant in a conspiracy case knows about all the doings of all the other defendants or not. *U.S.* v. *Kensil*, 295 F. 2d 489 (3CA, 1961)

In *U.S.* v. *Crosby*, 294 F. 2d 928, it was held: *Whether a scheme is one conspiracy or several is primarily a question for the jury.* (See authorities cited therein)

In *Food Machinery and Chemical Corporation*, 294 F. 2d 377, it was held: It is jury's function to say whether plaintiff's version of case is sustained by greater weight of evidence.

In *Teitlebaum* v. *C.I.R.*, 294 F. 2d 377; it was held: *Fraud is a question for the jury.*

And in *Curko* v. *William Spencer and Son* (2CA, 1961), 294 F. 2d 410, it was held: Plaintiff's failure to say in

so many words that he excepted or objected to charge did not constitute waiver of his right to object. (FRCP 46,51)

In *Rohlfing* v. *Cat's Paw Rubber Co.*, 17 F.R.D. 426 (1954), held: Generally, a charge of illegal conspiracy is a fact issue that cannot be taken from the jury, and the question of "malice" cannot be determined by the Court.

See *Sears* v. *International Brotherhood of Teamsters* (1941), 112 P. 2d 850, 8 Wash. 2d 447, and cases cited therein. The law assumes "malice" when one enters into a conspiracy to do a wrongful act. Such as to breach contracts, etc.

In *U. S.* v. *Sansome*, 231 F. 2d 882, held: One who joins a conspiracy takes it as it is, and is accountable for all prior conduct of co-conspirators. (The *Gypsum Case*, *supra*, holds the same).

In *Pridgin* v. *Wilkins* (10 CA, 1961), 290 F. 2d 74, it was held: In the interest of justice, an Appellate Court has power to consider errors when no objections were made below.

And, in *U.S.* v. *Doran* (7CA, 1962), 299 F.2d 511, it was held: One who is a part of a conspiracy is responsible for all that may be done or has been done. Participation in a conspiracy need not be shown by direct evidence.

E

The trial court failed and refused to follow the Federal Rules of Civil Procedure, approved by this Court and enacted into law by Congress (28 U.S.C. 2072). Such action or inaction on the part of the trial court, affirmed

by the Court Below, should be sufficient reason for this Court to grant a Writ of Certiorari to review this case, and exercise its power of supervision over the erroneous course of judicial proceedings. It is of great importance and materiality so far as practice and procedure is concerned. Rules 16, 26, 33, 34 and 45 were not followed by the trial court; the record on its face shows that very plainly, and there was Bias and Prejudice shown by the trial court throughout the proceedings in the case in favor of the Respondents (defendants in the trial court).

On p. 8 of the Opinion (R. 138), the Court Below said: "Here there was absolutely no evidence to justify the accusation of unlawful action" (referring to Counts Four, Five and Six). The record refutes this. But, such a statement is misleading, in the extreme, as the complaint in this case charges a malicious conspiracy: (1) to breach contracts of employment, which is a public wrong and unlawful; (2) to maliciously breach an implied warranty under assignments and a Power of Attorney; (3) to maliciously and illegally convert the escrow fund of $17,000.00 held by the Title Company from July 15, 1954, to about 1960; and, further, (4) to maliciously abuse legal process against this Petitioner. The Petitions of May 9, 1957, by the Shroyers, and others, to annul and rescind the Assignments and the Power of Attorney of 1955, with the Rules issuing thereunder for this Petitioner to show cause why it should not be done (that was never passed upon by the Court of Equity), was an unlawful action taken, under the Maryland Code and Rules. Also, the Rule issuing against this Petitioner in 1959 by these Respondents and others, working in concert, to have this Petitioner file a $20,000.00 supersedeas bond before he could go up to the Appellate Court on Appeal of the

equity case (No. 17,350), was an illegal action taken by those conspirators. All of these charges and allegations were involved in a continuing conspiracy, to damage and injure Petitioner, from about May or August, 1956, to about 1960. A conspiracy to breach contracts of employment and implied warranties, such as here charged, requires *due process*, under law, and a jury trial, with damages allowed.

The trial court refused to allow proper and necessary depositions to be taken, under Rule 26 (FRCP), after it had refused to allow depositions taken in the Companion Case in the District of Columbia to be used in the trial of this case, such as those of Meatyard, Galiher, Christopher, Osborne, Donnelly, Hilland, and others; the only ones allowed by the trial court, under its order, were the Shroyers, and those were not allowed to be read into evidence to impeach those hostile witnesses used as such on cross-examination. Those depositions should have been used and read into evidence to show that certain hostile witnesses used by Petitioner were unworthy of belief in anything, adverse to their interest; for many of them in their depositions in the Companion case testified, as a whole, substantially different from their testimony in this case. It was most necessary and material for Carlin's deposition to be taken after such rulings by the trial court; it was also necessary for other prospective witnesses to be made available and their depositions taken, in view of the trial court's ruling in that respect, before trial (*Hickman* v. *Taylor*, 329 U.S. 495). In that famous case, at p. 501, this Court ruled: "Fullest possible knowledge of the issues and facts before trial" should be allowed a litigant under the new rules (FRCP). That case opened up a new and broader field for discovery before trial, and

it took years thereafter before the federal trial courts, in general, understood just how wide that field was. Some trial courts don't even know or respect it yet. In *U.S. v. Matles* (2CA, 1957), 247 F. 2d 378, at p. 383, there is shown very clearly, what the law is today that should control, in these situations, and that there is no limitation, if the discovery sought has any bearing on the subject matter of the case, and which information might possibly lead to admissible evidence at the trial of the case. In *Slagle v. U.S.* (5CA, 1956), 228 F. 2d 673, at p. 679, that Court said:

> "The clearing of court dockets is one of the desiderata in the judicial function. But it should not be allowed to become a fetish for it does not rank with the raison d'etre of courts,—the administration of justice based upon a full and fair disclosure of facts." (Case reversed).

When motion for extension of time, within which to make full discovery in the trial court by the Petitioner, was argued, and for the arbitrary and capricious date fixed for trial to be extended, it was overruled. No motion had been previously filed by the Petitioner for time within which to take depositions, and the date for trial was set arbitrarily to satisfy the Respondents counsel, who had requested it, and who did not want any further facts brought out in the case before trial. That ruling showed gross bias and prejudice on the part of the trial court; for it was contrary to the rulings in the *Hickman Case*, supra.

Then, there was the ruling of the trial court, where Rule 16 (FRCP) was flouted and ignored. It was common

knowledge around the trial court that this particular Judge did not favor pretrial conferences as the rule suggests; so, when the matter came up in pretrial proceedings, after some of the attorneys on the other side had not only approached the court in Chambers about a pretrial conference, without this Petitioner having been advised thereof (pp. 4-9 Tr. Prs. 3/17/61, R. 330), the trial court, upon request by the Petitioner for a date to be set, reasonably in advance, for such a pretrial conference in conformance with Rule 16, stated that he would give a pretrial conference that day, if desired, but would not set any future date for it. If there had been a pretrial conference, in accordance with the provisions of the Rule, and all counsel notified in advance, Taylor, counsel for Meatyard and others, might have discovered that he had not answered Count Six for Meatyard.

F

When Petitioner moved for a directed verdict against Meatyard (Tr. Tr., p. 170, 4/25/61, R. 70) on Count Six and the Motion was overruled, the trial of this case had been finished, with the exception of Shroyers' motions for a directed verdict along with all the other defendants. Taylor for Meatyard claimed that the answer inadvertently had been overlooked, and that he should be allowed to amend; but he was allowed to amend, over strenuous objections, after directed verdict recorded (R. 69, Tr. Tr., p. 194, 4/25/61). When verdict was directed and recorded by the Clerk, there was no issue joined by Meatyard on Count Six. The record shows very clearly that the Respondents were mainly concerned with this case going to trial at as early a date as possible, and the trial court

rulings show plainly, to unbiased and unprejudiced minds, that the Trial Court cooperated in this respect, regardless of the *Hickman Case*, and numerous federal cases following it throughout the years since then.

Rule 34 and 45 (FRCP) were also flouted and ignored by the trial court: After orders were issued to produce and subpoenas served for the trial of case on certain defendants, the trial court failed to require the orders to be obeyed and the subpoenas duces tecum to be honored, wherefore this Petitioner was seriously handicapped and blocked at the trial as the result thereof, because of the failure to have produced certain papers and records called for which would have impeached absolutely certain witnesses, and would have shown that their statements on the witness stand at the trial, under oath, were unworthy of belief. For example, Osborne testified in a deposition in the Companion Case in the District of Columbia, in 1959, on material points, which was just the opposite to what he testified to in the trial of this case. Meatyard testified, also, in the Companion Case, in 1960, on material points just the opposite of what his testimony shows at the trial of this case. An analysis of the record throughout, shows clearly that the trial court in its rulings was biased and prejudiced against Petitioner and in favor of the Respondents (see pp. 10, 11, Tr. Pro. 7/14/61). Here is another significant statement of the trial court, in its instructions to the jury upon directing the verdict on Counts Four, Five and Six, "Now, I do not find in all the evidence with regard to Mr. Osborne that he had any willful, personal intention of meddling in their (Shroyers') affairs. They came to him, as they explained ***". It is well known and elementary in a conspiracy case of this kind that "*willful and personal intention of meddling*" has nothing

to do with such a matter. It is only a question of whether the individual charged with a conspiracy to do an unlawful act, such as breach of contracts, working in concert with others, by his own acts and agreement, became a party to such conspiracy by aiding and abetting in the commission of the substantive unlawful purpose. The fact is not denied that Osborne wrote the letter of August 28, 1956, to the Shroyers and advised them to get another attorney (his attorney), while Petitioner still represented the Shroyers, and that there were many contacts made between them concerning such matters, prior thereto. Osborne did not deny talking to Petitioner, over the telephone, several times prior thereto, and showing he was much concerned about the Shroyers' situation, and that money meant nothing—the case should be settled, and give Charles Visek whatever he wanted. When Osborne was asked in a deposition, under oath, about whether he had ever written a letter to the Shroyers, inasmuch as he had tried to avoid putting into evidence that there had ever even been any contracts made between them concerning such matters, he stated: "NO." That deposition should have been read to the jury in the trial of this case *in toto*. Mary K. Shroyer made a strenuous attempt to support Osborne in these statements: her deposition taken in Baltimore, in 1959, after a most strenuous attempt by attorney to keep that deposition from being taken, would impeach fully her testimony given in this case at the trial. A letter, in evidence in this case about September, 1955, to a friend of hers, almost a year earlier contradicts much that had been testified to by these two hostile witnesses. Conflicting inferences of fact can most easily be drawn from their testimony and the documents in evidence in this case.

ARGUMENT

Appellant's Petition for a Rehearing (of 17 pages) and his Brief (with record of pp. 25-149), filed in the Court Below, nine copies of which are filed with this petition, pursuant to Rule 21(4) of this Court, show very clearly the situation involved in the matters before this Court, also, the basic law covering the issues. It is requested, therefore, in order to shorten this petition, that the Court examine those printed pages, for it is believed such an examination would make more fully clear the entire picture.

Moreover, it is suggested by glancing at the Opinion of the Court Below, it can be seen easily, it accepted without any analysis whatsoever the statements of the trial court and the State Appellate Court (222 Md. 31, supra), and that the judgment in this case is not justice. The Court Below, obviously, assumed that the client had the right to discharge his attorney at will, when he had paid $11,500 as a reward for refusing to prosecute an original Case against him, and that there could not be any breach of contracts as a result thereof because of that fact. A fact that is not disputed is that the Clergyman Osborne aided and abetted the Shroyers, as shown by documentary proof and testimony, to the end that the employment contracts were breached, and that he meddled and interfered with confidential relations, unlawfully, existing between an attorney and his clients. So, the question stands out, in bold relief, here, is he to be exonerated because he is a clergyman? The trial Court held, yes. Osborne certainly agreed and combined with the Shroyers to breach those contracts, which resulted in damages and great injuries to this petitioner. That was an unlawful enterprise, undertaken by

them, working in concert, and they were scheming, all working in concert, as a result thereof to deprive, defeat, cheat and defraud, Petitioner out of fees earned and to be earned under those contracts of employment.

Assuming that was the origin of the conspiracy, even, when Osborne wrote that letter of August 28, 1956, to the Shroyers, advising them to consult his lawyer (Mr. Beatty), are those three conspirators to be exonerated because such a conspiracy developed into a much broader and more far-reaching conspiracy which injured and damaged Petitioner, where such purpose and objectives were unknown to them at the time; or because they did not know, or join in, the acts of their co-conspirators, later on. Most naturally, all the conspirators would deny they worked in concert, and aided each other, to a common end and for a common purpose, as the *Gypsum Case, supra*, pointed out.

It is well-known and elementary law, touching on conspiracies of this character, that an unlawful conspiracy may be formed without simultaneous actions or agreements on the part of the conspirators. In order that one may be found guilty as a conspirator, it need only be shown that, with knowledge of the conspiracy, he knowingly performs acts designed to promote or aid in the attainment of the purpose (*Nocrr Motor Freight Case* and *Calcutt* v. *Gerig, supra*). It is also elementary law that every person entering into a conspiracy, already formed, is deemed in law a party to all acts committed by any of the other parties, either before or after his entrance, in furtherance of the common design. A wife can now become a co-conspirator with her husband. In this case, Mary K. Shroyer was a guarantor on two of the employment con-

tracts (R. 21-25, Exhibits "C" and "D") and she promised to pay in accordance with the provisions thereof. See *11 Am. Jur.*, Sec. 48, p. 581, and Sec. 47, p. 580 (Conspiracy).

In *U. S.* v. *Paramount Pictures*, 334 U.S. 131, 92 L. Ed. , this Court held: It is not necessary to find an express agreement in order to find a conspiracy, but is sufficient that concert of action is contemplated and that defendants conformed to the arrangements. Moreover, in *Ball* v. *Paramount Pictures*, 169 F. 2d 317, it was held: An unlawful conspiracy may be incurred where concert of action could not possibly be sheer coincidence. Meatyard's letter to Petitioner dated September 12, 1956, the very same date of the letter of the Shroyers discharging Petitioner as their attorney, and saying how his clients would settle the Shroyer controversy, and after his promise of August 6, 1956, saying he would advise Petitioner the next week; and then after writing it, according to his statement under oath, held up such an important letter for five days before mailing it: No, that was not sheer coincidence. Who would believe it? No reasonable, fairminded man would. Then, added to that, as a supplement, Shroyers letter to Petitioner of August 6, 1956, saying 'settle with Meatyard and others on any terms—but settle the matter. The inference of fact is clear that Meatyard, individually, or through some of his many agents, made contact with the Shroyers and caused that letter of August 6, 1956, to be written; for no information had come to Petitioner from the Shroyers to settle all matters in controversy with the District Supply and others at any costs until that date. Neither was that any sheer coincidence (See R. 142-15).

Osborne's conference with Galiher and Donnelly (admitted) on August 31, 1959, the day deposition of Os-

borne was taken in the Companion Case in Washington, D.C., and Donnelly representing Osborne in the taking of that deposition throughout, unofficially, develops a clear conflicting inference of fact that Osborne connected with some member of Galiher's office many times, and undoubtedly prior to that letter of his, dated August 28, 1956, addressed to the Shroyers—although at first in that deposition, under oath, he said he had never written the Shroyers any letter, and admitted it only after he was shown the letter itself. Then, he tried to change, and did change, the transcript itself after the testimony was written up, and before it was filed in the Companion case. This was the letter referring the Shroyers to Beatty, his lawyer.

From there, the chain of circumstances, began, undisputed, and based on documentary proof and uncontradicted testimony in the record: To Artis, to Mann and Guy, and from Guy to Hilland, who could not be found by the Marshal to testify in the trial of this case (R. 84), yet the trial court referred to the fact in his instructions to the jury that Hilland had not been placed on the stand as a witness, and it would not continue the case in order that further witnesses of the highest importance might be made available—even after Meatyard was allowed to amend, when the directed verdict had been received by the jury and returned—and the Clerk had recorded that verdict (R. 69) in favor of all the defendants on Counts Four, Five and Six (including Meatyard, who was a U.S. Commissioner for Montgomery County, Maryland, and who had been such for years. The deposition of Hollis (James G.) should have been taken, after it was discovered who Hollis was (Meatyard's Associate in his office).

In accordance with the holdings in the *Connally Case*,

supra, namely, that individual and collective interests of alleged conspirators, the situation and the intimate relations of the parties at the time of the commission of the acts complained, the circumstances preceding and attending the culmination of the claimed conspiracy or conspiracies, could anyone believe who was not biased or prejudiced, coupled with the conflicting inferences of fact throughout this record, that Meatyard, Christopher, Galiher, Hilland, Mack and the Title Company, were not parties to the conspiracy as charged? And, moreover, either individually and personally, or through their agents, had an awareness of, and actually knew what was going on, from the beginning, about May 31, 1956, when Christopher had shown from the outset, on that date, and in his testimony on the stand as a hostile witness, in the trial of this case, that he was extremely hostile to this Petitioner.

Meatyard would not deny at the trial, when on the stand as a hostile witness, that he held a conversation over the telephone with Petitioner on or about October 1, 1956, at which time he told Petitioner he had seen cancelled checks of the Shroyers where they had paid Petitioner $4,000.00 as fees for his services, during the time he represented them (from April 5, 1954, to September 15, 1956). Meatyard stated in his deposition in Washington, on March 7, 1960, however, that the telephone conversation was a "FABRICATION". He did admit however, that the Shroyer controversy had not been settled at that time and gave that as a reason why he could not have told Petitioner that all the matters of the Shroyers had not been settled at that time (about 10/56). Meatyard's testimony as shown (R. 92-125) will show, as a fair example, what the situation was from his individual standpoint. Petitioner suggests that this Court examine that part of the record, particularly.

One point stands out, in bold relief, in Meatyard's testimony: He said under pressure that he talked to Mrs. Shroyer on March 20, 1957, when all the matters were settled with the Shroyers and the District Supply (his client), which was the time of the hearing on the Rule to Show Cause, and when they had asked the Equity Court to direct the Title Company to pay over the escrow fund —but he did not see the cancelled checks, he stated.

When the trial court ruled that all depositions taken in the Companion Case in Washington could not be used in this case and read into the record to impeach certain defendants, used as witnesses in this case at the trial, this petitioner was grossly prejudiced and injured beyond redemption, for substantially and basically, in many instances there were contradictions. The Shroyers' depositions that the trial court ruled, originally, could be made use of at the trial, when Petitioner asked that they might be read into the record, it refused to allow it to be done.

Of course, a client can discharge his attorney whenever he likes with or without cause, but if others combine, agree with him, abet and aid him, in so doing, which fact brings it about, that is an unlawful conspiracy for which the law requires damages to compensate that attorney for such injuries (IN RE PASCHAL, 77 U.S. 483, 19 L. Ed. 992, Kapler v. Sumpter, 33 App. D.C. 404).

When the jury in this case were considering their verdict on Counts 1, 2 and 3, they did not have the contracts of employment before them. These contracts were Exhibits "A", "B", "C", "D", and "E" and were parts of the Amended Complaint on these Counts. The Trial

Court directed that the Amended Complaint go out with the jury, but the Clerk failed to attach these employment contracts; so, inasmuch as the jury did not have these records before them, in their deliberation on these counts, and as the Petitioner was not allowed to explain them on the blackboard, he was greatly prejudiced and damaged thereby. These were contracts that contained elements of damages on Counts *1*, *2* and *3*, and for these reasons, alone, reversible error appears.

As to the Fourth, Fifth and Sixth Counts, the trial court directed a verdict for all the defendants; it passed on the credibility of witnesses and the conflicting inferences of fact in so-doing, based on the testimony and documentary evidence. This is reversible error. Petitioner has, in effect, been deprived of a jury trial on Counts Four, Five and Six; he has not been afforded a fair and impartial trial in this case. Due process of law has not been afforded him. He was not even notified when the hearing for the judgment absolute, on the attachment, was to be held under which the Title Company paid out the escrow fund, and the answer to the attachments by the Title Company did not show this petitioner had a claim against the escrow fund.

In *International Harvester Corp. v. Goodrich*, 350 U.S. 537, 100 L. Ed. 681, at p. 549, this court said:

> "It is one thing, for a creditor, who has enabled his debtors to hold himself out as having dominion over property which the creditor has placed within his debtor's control, to suffer for debts incurred by his debtor to third persons. It is quite another thing to saddle such creditors' property with satisfaction of prior obligation to a third person when the creditor

had no means whatever of safeguarding against the agreement of such third party indebtedness."

In *Cozzy v. Somers*, 351 U.S. 141, 100 L. Ed. 1021, this Court held: The elementary requirement of due process assumes reasonable notice calculated to apprise interested party of pendency of action and afford such party an opportunity to be heard and present objections. (See also, *Pennoyer v. Neff*, 95 U.S. 714 and *Harvey v. Elliott*, 167 U.S. 418). In *Sochozer v. Board of Higher Education of New York*, 350 U.S. 551, 100 L. Ed. 692, it was held: The *protection of the individual from arbitrary action is the very essence of due process of law*. The record in this case clearly shows arbitrary, capricious and discriminatory action on the part of the lower courts, while the law of the land and justice require that this Court correct it. In *Smith v. Texas*, 233 U.S. 630, this Court said:

> "Life, liberty, property and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any of these separate and independent rights may lessen or extinguish the value of the other three."

A valuable contract right is property within the meaning of the Fifth Amendment (*Bank of Columbus v. Okeley*, 4 *Wheat.* 244, *Omina Co. v. U.S.*, 261 U.S. 502).

CONCLUSION

For the foregoing reasons and authorities cited this Petition for a Writ of Certiorari to the Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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NOTE: *Emphasis added.*
O/R—*Original Record.*
R—*Record from Court Below, certified.*
Tr. Tr.—*Transcript of Trial.*
Tr. Pro.—*Transcript of Proceedings other than trial.*

APPENDIX A

OPINION OF THE COURT OF APPEALS
(Filed March 5, 1962)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8461

Luther Robinson Maddox,
Appellant,

versus

Fidelity Investment & Title Co., Inc., and James C. Christopher, As Secretary thereof and Individually, F. Archie Meatyard, Jr., Individually and as Attorney for District Supply, Inc., et al., Owen E. Osborne, Raymond O. Shroyer, and Mary K. Shroyer, His Wife,
Appellees.

APPEAL FP. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
W. CALVIN CHESNUT, DISTRICT JUDGE.

(Argued January 9, 1962. Decided March 5, 1962.)

Before HAYNSWORTH and BOREMAN, Circuit Judges, and PREYER, District Judge.

Luther Robinson Maddox, Pro Se, and James J. Doyle, Jr., (Sherbow & Sherbow, Hecht, & Hecht, and Isaac Hecht on brief) for Appellees, Raymond O. Shroyer, and Mary

K. Shroyer, and B. Conway Taylor, Jr., (Duc, Nickerson, Whiteford & Taylor on brief) for Appellees, Title Company, Christopher, Meatyard and Osborne.

L. Richardson Preyer, District Judge:

The plaintiff Maddox, an attorney, established an attorney-client relationship in April, 1954, with the defendants Shroyer. Plaintiff had defendants Shroyer execute three contracts of employment and various other documents purporting to protect plaintiff's fees for professional services. When plaintiff failed satisfactorily to conclude their legal difficulties in a reasonable time, defendants Shroyer discharged him in September, 1956. Plaintiff subsequently filed this suit in the United States District Court for the District of Maryland.

The case was tried before Judge W. Calvin Chesnut and a jury. At the conclusion of all the evidence on Counts 1, 2 and 3 which charged defendants Shroyer with breach of contract, the jury returned a verdict for defendants. At the conclusion of plaintiff's case on Count 4, which charged a conspiracy to breach contracts; Count 5, which charged an illegal conversion of escrow funds; and Count 6, which charged a conspiracy to commit an unlawful abuse of process, the trial court granted defendants' motions for directed verdicts.

Plaintiff has appealed from the judgments entered on these verdicts. The numerous errors assigned by plaintiff are discussed for convenience under three headings: 1) whether the jury's verdict for defendants on Counts 1, 2 and 3 was contrary to the law and evidence; 2) whether the

trial court committed error in granting defendant's motions for directed verdict on Counts 4, 5 and 6; 3) whether the trial court abused its discretion in making rulings prior to and during the trial.

An understanding of the questions involved and the relationship of the various parties to the suit requires this statement of the facts. Defendant Shroyer in 1954 was an officer and employee of District Supply, Inc. which was represented by F. Archie Meatyard, Jr. Early in that year, certain discrepancies appeared in the books of that company, and its officials felt that Shroyer had wrongfully taken funds from that Company in amounts estimated to be upwards of $20,000. As counsel for the Company, Meatyard instituted suit in equity against Shroyer and his wife. This suit sought to impress a trust upon real property of the Shroyers, on the grounds that the funds Shroyer had taken had gone into the property.

After the institution of the suit, an opportunity to sell the property at a favorable price presented itself to the Shroyers, and they contracted to sell it. Fidelity Investment and Title Company, Inc. examined title at the instance of the purchaser. James C. Christopher, secretary of the Title Company and another defendant in the case, upon reviewing the examination, was not willing to pass title in view of Meatyard's suit against the Shroyers. When informed about the matter, and learning that the price was a favorable one, Meatyard, in behalf of his client, agreed that the transaction might go through provided that the net proceeds of settlement be retained by Title Company in escrow pending the outcome of the litigation between District Supply and its former employee, Shroyer. Settlement on this basis occurred in July, 1954.

At approximately this time the Shroyers employed the plaintiff Maddox in connection with this litigation. It proceeded very slowly with voluminous hearings, motions, and legal maneuvers over the following two years. Shroyer, having been discharged by District Supply, commenced a business of his own, which during this two year period, got into financial difficulties, in connection with which he employed Maddox. Likewise, toward the end of the two year period, a criminal indictment was handed down against Shroyer, and he employed Maddox in this matter. During the period of Maddox's employment, he was paid in fees sums which Maddox states to have aggregated $2,125.00 and which Shroyer contends amounted to considerably more.

In August, 1956, the Shroyers, having become concerned over the apparent inability of Maddox to resolve their difficulties, determined to procure other counsel. They sought the advice and recommendation in this respect of their minister, Owen E. Osborne, another named defendant. Osborne recommended an attorney at their request.

Counsel recommended by Osborne was unable or unwilling to accept the representation of the Shroyers, as were several other attorneys to whom Shroyers were referred by this attorney and others. Ultimately, in August or September, 1956, Shroyer obtained new counsel and discharged Maddox in writing. In a matter of months new counsel successfully reached an agreement under which District Supply's claim against the Shroyers was settled by a consent judgment for $11,500.00 and the indictment against Shroyer was dismissed.

During his employment, however, Maddox had ob-

tained from the Shroyers various writings, on the basis of which he contends that he was entitled to the entire escrow fund. Upon his discharge he asserted entitlement to something in excess of $30,000.00 in additional fees. In October, 1956, as he struck his appearance from the case brought by District Supply, he simultaneously intervened therein as a party, asserting his claim to the fund.

On March 15, 1960, in the case of *Maddox v. District Supply, Inc.*, 222 Md. 31, the Court of Appeals of Maryland stated that he had no claim to the fund by reason of his various instruments hereinbefore referred to.

In 1957 Maddox instituted a suit in the District of Columbia against most of the defendants in the present case and others, including some of counsel who had participated in the original litigation, on substantially the grounds asserted in the instant case. The present defendants were removed as parties to that litigation because of non-residence in the District of Columbia, but voluminous depositions were taken.

In 1959, the instant suit was brought. Its first three counts are against the Shroyers and are predicated upon Maddox's various instruments of employment and powers of attorney, and judgments are sought against the Shroyers for fees in the amount of $43,405.13, plus interest. The fourth count charges all of the defendants with a conspiracy to cause the breach of Maddox's contracts of employment with the Shroyers and seeks damages in excess of $200,000.00. The fifth count charges Christopher, the Shroyers and Title Company with illegal conversion of the escrow fund, seeking $17,000.00 from those defendants. The sixth and last count charges all parties to the suit other than

Osborne with conspiracy to commit malicious abuse of process, and seeks damages of $42,000.00.

THE JURY VERDICT ON COUNTS 1, 2 and 3

These counts sought damages for breach of contract. The defense denied the contracts were fair and reasonable under the circumstances. Testimony took five trial days. The Court submitted the case to the jury under a charge that was not excepted to and which was completely fair to plaintiff. The trial judge properly instructed the jury that an attorney's agreements as to fees must be fair and reasonable, in view of the confidential relationship which exists between attorney and client. The court further instructed the jury as to the factors to be considered in determining whether the agreement was fair and reasonable. The jurors were also instructed that if they found the agreements were not fair and reasonable, they should award the plaintiff such amount over and above what he had already been paid that seemed to them to be fair and reasonable under all the evidence. The jury had the benefit of Maddox's testimony in voluminous detail as to the work he had performed and found that he had been adequately compensated by sums he had received prior to his discharge. This lays the matter to rest, once and for all. Where, as here, there is an evidentiary basis for the jury's verdict, the appellate court cannot be asked to substitute its judgment for that of the jury. *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946).

THE DIRECTED VERDICT ON COUNTS 4, 5 and 6

These counts alleged a conspiracy between the Shroyers, Rev. Osborne and a number of Maryland and District of

Columbia lawyers and illegal conversion of funds. The court directed a verdict for defendants at the conclusion of plaintiff's case.

The testimony indicated that the Shroyers determined in 1956 to discharge plaintiff as their counsel. Prior to terminating that relationship, they discussed employment of new counsel with Rev. Osborne, their minister. Based on his initial recommendation and references from lawyer to lawyer, all of whom were unavailable for employment, the Shroyers were in brief contact with four attorneys. Finally after the Shroyers formally discharged plaintiff, Arthur J. Hilland accepted employment. In a short time he concluded all litigation pending against them.

Maddox charged that the four attorneys, Rev. Osborne, the Shroyers and the attorneys representing District Supply Co. acted in illegal concert to bring about his discharge and to maliciously abuse process. After two days' testimony plaintiff rested his case, and the court granted motions for directed verdicts at the conclusion of oral argument.

Twenty witnesses were called, many of them attorneys, in an effort to show the conspiracy. An examination of the record, however, indicates that nowhere does there appear a shred of evidence to support plaintiff's charges. There was no contact between any of the people involved other than the incidental chain of contact concerning employment of new counsel. The evidence of a conspiracy that plaintiff has advanced amounts to no more than that the Shroyers employed another lawyer. We are not faced here with the question of whether the trial court properly directed a verdict where there was conflicting evidence. Here, there was absolutely no evidence to justify the accusation of unlawful action.

Neither was there any probative evidence of an illegal conversion. None of the testimony indicated Maddox had any right, title or interest in the escrow fund which amounted to $17,000. Moreover, Maddox had already tested his claim to that fund and had obtained a judicial determination that he was not entitled to any of the proceeds. *Maddox* v. *District Supply, Inc.*, et al. (1959) 222 Md. 31, 148 A. 2d 650. In view of this ruling, plaintiff has completely failed to establish any conversion of funds to which he had title or the right to possession.

DISCRETIONARY RULINGS BY THE TRIAL JUDGE

The remaining thirteen questions raised in this appeal involve alleged abuse of discretion in rulings by the trial judge prior to and during the course of the trial. These range from the court's denial of plaintiff's motion for a new trial to such matters as the court's refusal to permit the use of the blackboard during the presentation of his case, (and distinguished from its use as an aid in closing argument). Seriatim discussion of these questions would not be fruitful. Careful analysis of each assignment of error in the light of the applicable law proves no abuse of discretion occurred.

Plaintiff has had his "day in court" in the form of seven trial days before a jury of his peers and many hours spent in hearings involving procedural and discovery matters. He has had the benefit of a careful and considerate trial judge who conducted the trial according to the highest traditions of the judiciary. The obligations that American justice owes to every litigant have been fully satisfied. The Shroyers attempted to discharge the plaintiff some five and a half years ago; they are now entitled to their peace.

The judgments of the lower courts are affirmed.

Affirmed.

APPENDIX B

TRIAL COURT'S CHARGE TO JURY ON COUNTS 1, 2 and 3

(Tr. of 4-21-61, pp. 40-63)

THE COURT:

Members of the Jury, now that you have heard all the evidence in the case relating to these first three counts of the complaint, all of which relate to the matter of fees or compensation of the plaintiff, and after you have heard the arguments of counsel on the facts, it becomes the duty of the Court to charge you in the case.

The purpose of the charge, primarily, and in this case almost wholly, is to explain to you the law that is applicable to this particular kind of a case or in this particular case itself. And, what I tell you as to the law of the case you accept for purposes of the case.

In the event that any party to the case would be dissatisfied with what I have said as to the law, there is ordinarily an opportunity for an appeal and so far as you are concerned, you take the law to be what I tell you it is.

Now, anything I should say or happen to say with regard to the evidence in the case, or the effect of it, or the facts of the case, would not be binding on you in any way, but is merely advisory to you.

With that preface, let me call your attention to just exactly what is before you. Only the first three counts or paragraphs or charges in the complaint are before you at this time.

The first count relates to a charge for the services of the plaintiff in the so-called equity case in Rockville. The second count relates to the matter of the proposed criminal indictment against Mr. Shroyer. Then, the third relates to the plaintiff's services under the contract for professional services relating to the Ray Supply Company. Now, you have to consider each one of these counts separately and respectively.

It is hardly necessary to remind you who the parties to the case are. The plaintiff, Mr. Maddox, is a Washington lawyer of some years' practice, and he is the one who is suing to recover fees for professional services.

The defendants are citizens of Maryland and they are the clients, or at least, more particularly, Mr. Shroyer was the client and Mrs. Shroyer was a guarantor of the payment of fees for which Mr. Shroyer became liable under the agreements in the case.

Now, with that preface, let me come at once to the heart of the case. And here, while my charges to the Juries are nearly always oral and to that extent might be called extemporaneous, I have dictated to my secretary and she has written up two or three pages that I will read to you slowly so that you can understand just what I am telling you about the law applicable to this case. It relates wholly to the first three counts of the complaint.

Now, first I state some matters that are not in dispute. One, prior to April, 1954, the District Supply Company, a corporation of which Shroyer had theretofore been an officer, made a claim upon Shroyer for an alleged indebtedness of no precisely stated amount, but approxi-

mated ten to twenty thousand dollars. In defense of the claim, Shroyer consulted the plaintiff, Maddox, a lawyer, on or about April 5, 1954, and agreed to pay him a retaining fee of $500.00 to investigate the claim. Later, on or about July 1, 1954, Maddox and the Shroyers, or at least Mr. Shroyer and Mrs. Shroyer as a guarantor made a written agreement with Maddox—

MR. MADDOX: May I correct that, Your Honor? She was not the guarantor on July 1, 1954, but later on the others.

THE COURT: Very well. The jury can accept that correction about the matter. The written agreement was that Maddox would represent the defendant, Shroyer, in an equity suit then pending in the Circuit Court for Montgomery County, Maryland, in which the District Supply Company was the plaintiff and was seeking to establish a lien for its claim on real estate belonging to the Shroyers.

One provision of that agreement was that the Shroyers should pay to Maddox compensation or fees at the rate of $100.00 per day for services alleged to have been rendered by Maddox. He has claimed an aggregate compensation over and above all credits in the amount of $22,690.13, with interest, as to that first count of the complaint.

Two, on or about August 23, 1954, Maddox and the Shroyers, or Mr. Shroyer with Mrs. Shroyer as guarantor, entered into another written agreement for compensation for fees to be paid to Maddox for his professional representation of Shroyer in defense of a threatened criminal

prosecution for embezzlement expected to be filed in the District Court of the United States at Washington, D.C.

The compensation stated was at the rate of $100.00 per day for the services alleged to have been performed in accordance therewith. Maddox claims in the net sum of, over and above credits, of $6,300.00.

Three, on or about November 10, 1954, Maddox and the Shroyers entered into another written agreement that Maddox should perform professional services to Shroyer in the matter of the Ray Supply Company, a partnership in which the Shroyers—in which Shroyer was then interested, for services alleged to have been performed by Maddox under this agreement, the claim is now for net compensation in the amount of $3,415.00 over and above credits, and at the rate of $100.00 a day for services performed by Maddox.

Four, the defendants dispute the validity and enforceability of these agreements and further say that they are not indebted to the plaintiff in the several amounts claimed.

Now, the law with respect to the validity and enforceability of these several agreements, the Jury are instructed as a matter of law as follows: One, in view of the confidential relationship between attorney and client, the terms of the respective agreements with regard to the rate of compensation or fees are not valid and enforceable against the defendants unless the Jury finds by a preponderance of the evidence that the terms of the agreement were fair and reasonable. Two, if the Jury finds by a preponderance of the evidence that the terms of the

agreements were fair and reasonable, they should find a verdict for the plaintiff in the amounts that they find represent fair and just compensation to the plaintiff for services proved under the respective agreements, considering in that connection the provisions of the agreements as to terms of compensation and the time they find was reasonably and necessarily spent by the plaintiff in pursuance of his work, and the benefit, if any, received by the defendants from the plaintiff's services.

But, if the Jury does not find by a preponderance of the evidence that the terms of the agreements fairly considered, are fair and reasonable, then the Jury are instructed that the terms of the agreement as to compensation are not valid and enforceable against the defendants, and in that event, the Jury should allow the plaintiff compensation—should not allow the compensation except for such sum or sums as they find constitute reasonable compensation for fees and expenses over and above the amounts which they find to have been paid by the defendants to the plaintiff under said agreements severally considered.

The total amount under the three agreements which the plaintiff says that he has received for account of fees is about $2,100.00 and some $700.00, I think, for expenses. The defendants, however, claim that they have paid about $3,000.00 for account of fees.

Now, those are the principal instructions as to the law applicable to this particular case, and, if the Jury has not caught them as I have read them, I will be very glad to repeat them, or if you have a question to ask later on as to just what they were. Of course, you better ask the questions before you retire to consider your verdict.

Now, there are some other instructions which are applicable to practically any kind of case that is tried before a Jury and they are equally applicable to this particular case. One which is more especially applicable to this particular kind of case is that as a matter of law, a client, somebody who has consulted a lawyer and is receiving his services, the client is entitled to discharge his lawyer at any time, but if he discharges the lawyer without cause, without just cause, he remains liable to the lawyer for damages for the fee which he had agreed to pay, or for such amount as the Jury finds reasonable under the circumstances of the case.

Anything that is applicable to nearly all cases of this general nature where there is a suit for damages by the plaintiff, the credibility of all the witnesses, and each one of them, is for the Jury to determine. No, credibility means not only the willingness of a person as a witness to tell the truth, but also his intelligence and ability to have comprehended and to relate to the Jury accurately just what he knows; or in the case of controverted facts as to a collision, or something of that kind, what he saw about the case. Credibility also importantly deal with the question of what is the interest of a witness in the outcome of the suit. Here, of course, the plaintiff is directly and particularly interested as plaintiff, as he is the one seeking the money award in the outcome of the suit. The defendants, the Shroyers, are also interested directly in the outcome of the suit, so that you are to be the judge of the credibility of all the witnesses, and in this case there is a sharp dispute with respect to the credibility of the plaintiff and of the Shroyers, respectively, as witnesses in the case. You have to determine that, nothing that I have said or intimated in any way, and I don't recall I have

made any comment about that at all, but that is entirely for you and you must be the whole, sole judges of that for yourselves.

Now, in one of the instructions as to the law I gave as to what should be considered by you in the nature of just compensation is a reference to the amount of time spent by the plaintiff on pursuance of his duties as lawyer. Now, some of the more important elements in determining what is a just fee to a lawyer in any particular case, as you have heard me say during the progress of the case, was first, what is the nature and complexity of the case, what is the difficulty that seems to exist as a matter of law, or is it a comparatively simple case which should be known more or less at once to experienced lawyers in that kind of litigation. Then, another element, is, if you find it is a complex case on the one hand, or if you find it is a simple case, apparently, on the other, what is the amount of time that is reasonably and necessarily spent by a lawyer of experience in the handling of a case of that kind?

In this case, of course, there is a great dispute between the parties as to the amount of time the plaintiff testifies he spent in respect of these several matters, respectively, and that's a matter for you to determine from all you have heard and all of the nature of the case, whether the whole time the plaintiff says he spent in the matter was reasonably and with reasonable necessity expended by him in performance of his duties.

The defendant contends, no, that there is much of this time that would not reasonably have been required, and the plaintiff says that he thinks it was all, all the time he

has charged for was reasonably necessary for this particular case. Plaintiff also says it was a complex case, while the defendants maintain it was a very simple case, or a comparatively simple case. Those matters, you have to decide from all you have heard in the case on evidence. The burden of proof to show what is reasonable in this case with respect to the nature of the agreements or the amount of the fees charged is on the plaintiff. That's always the case where a plaintiff comes into court seeking damages, he is the actor in the matter and the burden of proof is on him to establish his claim by a preponderance of the evidence. A preponderance of the evidence means the more weighty evidence, the more convincing evidence. After you have heard both sides and there is a disagreement or contradiction or controversy over what was said or done, the question ultimately for the Jury on the facts is whether the plaintiff has satisfied you of his contentions in the matter by the more weighty evidence. The more weighty evidence does not necessarily depend on the number of witnesses.

In judging credibility of witnesses, you judge, as I say, not only their general truthfulness or disposition to tell the truth, but their intelligence, what they really did observe, what they really do know about the matter, and how clearly they have related it to you. That's a matter of preponderance one way or the other, but it is for you, taking into consideration all these factors, to determine for yourselves whether the plaintiff has established his claim or to what extent he has established it by a preponderance of the evidence.

Another factor that everybody agrees exists in a case of this kind is with regard to the basis of compensation,

not only the nature of the case and the time reasonably spent pursuant to it by the lawyer, but the result of the case, or stated in another way, possibly more aptly as to this case, what benefit the defendant has received from the plaintiff's services. On the burden of proof, it is also well established in cases of suits for damages where the burden of proof is on the plaintiff to satisfy the Jury by a preponderance of the evidence, if there is what you might call an even balance of opinion in the minds of the Jurors, individually, with regard to whether the burden of proof has been met or not, in other words, the verdict of the Jury, as to any of these matters, has to be unanimous. Until you have a unanimous conclusion, you don't reach a verdict, and in weighing the evidence, you have to be satisfied affirmatively of the proposition urged by the plaintiff in the case. Now, I think that is all that I need tell you, Members of the Jury, unless you have some question you want to ask me with regard to the applicable law as I have explained it to you with regard to whether compensation, terms in the agreement, were fair and reasonable or not.

A JUROR: Your Honor, one thing I would like to know, the retainer fees, are they included—

THE COURT: What, sir?

A JUROR: The retainer fees that were paid, are they in the amounts he said he received or are they separate?

THE COURT: I understand that they were paid, the $500.00 was paid and the amounts now claimed by the plaintiff are in addition to that. I think I am right about that.

MR. MADDOX: May I suggest, he wants to know, I think, what a retainer fee means, whether that has to do with services or not, or just to be retained in the case.

THE COURT: You didn't mean that, did you?

A JUROR: No, I think he said in one instance $1,700.00, the five hundred they paid on that is that part of the seventeen hundred or separate?

THE COURT: I understand that was separate to the claims that are now made for $22,000.00 in one case, six thousand in another, and three thousand in another. In other words, the $500.00 is not on account of the fees now being sued for. That has been paid. It was an initial matter which the plaintiff says, I want a retaining fee of $500.00 before I do any work on the case.

A JUROR: I understand that, sir.

THE COURT: Then that was paid, then thereafter these written agreements were made and the plaintiff is now claiming as balance the amounts I have mentioned.

MR. MADDOX: I still believe this Juryman is not clear on it. A retaining fee is simply to retain the attorney in the case and have (has) nothing to do with services whatsoever. That's the question, I think.

A JUROR: I understand what a retaining fee is, I did not know whether it was part of the moneys he said, he received or not—

THE COURT: He said he received that before.

A JUROR: I understand now.

THE COURT: You understand it now.

Members of the Jury, the procedure hereafter for you is this, when you retire to your Jury Room to consider the case, you do not reach a verdict until you get a unanimous verdict, and in order possibly to have you follow some of the points raised in the instructions, I would ask you to answer two particular questions. First, do you find that any of the three agreements between attorney and client are fair and reasonable. Answer this question, yes or no, and check you answer. You will note that the question is phrased, any of the three agreements. There are three separate agreements. It is conceivable that you may find the arrangement as to fees reasonable in one, but not in others, or you may find the arrangements in none of them are fair and reasonable, but the question is, do you find that any of the agreements were fair and reasonable as to compensation, answer that question, yes or no. Now, if you have answered the question, yes, and putting it that way, don't imply any misunderstanding or thought on my part as to how you should answer it. I merely want to ask—whether you properly answer it yes or no. If YOU HAVE ANSWERED IT, YES, then state which one or all of the said arrangements are fair and reasonable and check your answer. Then, I put here, first agreement, second agreement, third agreement. Of course, you may answer that all of them were reasonable or you may answer that none of them were fair and reasonable. That's entirely for you. Then, finally, in accordance with the instructions given you, state the amounts, if any, that you find constitute fair and reasonable compensation to the plaintiff on account of the several agreements respectively considered.

Now, the amounts there are called for as amounts that you decided on now. Bear in mind that under the instructions, if you find that the agreements or any one of the agreements is fair and reasonable, then your basis of determining the amount of compensation the plaintiff should receive is broader and wider than if you find that a particular one of the three agreements or all of them were not fair and reasonable.

If you find an agreement that was fair and reasonable as to its terms, then in determining the amount, you have to bear in mind a broader range of considerations than if you find it was not fair and fair and reasonable, in which event, you can properly award the plaintiff only such amount over and above what he has already paid that seems to you to be fair and reasonable under all the evidence in the case. When you have answered these several questions, and of course, if you should find that there is no further sum reasonably to be paid, why you would indicate that by answering under the first agreement, nothing; second agreement, nothing; third agreement, nothing; but if you find there is something in addition to what the defendant has paid, then you should put in the amount, in dollars or dollars and cents, after each one of the three agreements.

When you have answered these questions, when you have reached a unanimous verdict on the case as a whole, whether the verdict should be for the plaintiff or for the defendant, or in what amount for the plaintiff, then the bailiff will bring you in court and the Clerk will call over your names to identify you as the particular panel in the case, panel of Jurors. Then the Clerk will ask you with respect to each of these first three counts, one, two and

three, as to the first count, do you find for the plaintiff or for the defendants. If you find for the defendants, then the Clerk asks you no further questions as to that first count, but if you find for the plaintiff, he will then ask you in what amount do you find the damages, and you will answer that in dollars, and it ought to be consistent, of course, with any figure that you have put here in answer to this second question, of which you will have a copy. Then the Clerk will ask you the same questions with regard to the second count, and the same things apply. If your verdict is for the defendant, there is nothing else for you to say. If your verdict is for the plaintiff, then the amount you state as damages. And, he will ask you the same question with the same procedure regarding the third count of the complaint. Are there any exceptions—

MR. MADDOX: Your Honor, may the Jury take with them to their chambers in conference the complaint on those first three counts?

THE COURT: I am afraid that will be more confusing than helpful to the Jury according to my experience. The language of the complaint, you know, is in lawyer's language, very properly, for the pleadings in the case, but it is not much help to the Jury. I am giving, or will give them, if counsel agree on it, the instructions in which the amount of plaintiff's claim is stated as to each of the three counts.

MR. DOYLE: The entire set of instructions, your Honor—

THE COURT: I can't—no, it would not be possible to give them the entire instructions, I will have to change that.

You can make a memorandum, Mr. Foreman, as to the amount claimed by the plaintiff in each of the three cases and the amounts are—you make it, Mr. Graham.

MR. MADDOX: The Foreman has paper, also.

THE COURT: Amount claimed by the Plaintiff in the first count is $22,699.13, the amount claimed in the second count is $6,300.00, the amount claimed in the third count is $3,415.00. Are there any exceptions to the charge?

MR. MADDOX: I would like to have a ruling on the sending the complaint as is on the three counts to the Jury Room with the Foreman.

THE COURT: It has not been the practice here to do that, Mr. Maddox.

MR. MADDOX: I would like to have the Court's ruling on it—

THE COURT: Rather than have a controversy about it, I will let the Jury have the three counts, have you them, Mr. Graham?

THE CLERK: I will have to take the complaint apart, your Honor, because the fourth, fifth and sixth counts are also there.

THE COURT: Just give the Foreman of the Jury the first three counts. Members of the Jury, let me say with regard to that, it is in lawyer's language and the Court language, and if you have any failure of understanding just what it does ask for, you have a perfect right to consult me about it. I have not usually found it neces-

sary to have the Jury undertake to take the complaint with them in the Jury Room, but as it is asked for in this case, I will grant it. I take it there are no exceptions other than that. Well, Members of the Jury, you may retire unless you have some further questions to ask.

APPENDIX C

TRIAL COURT'S INSTRUCTIONS TO JURY ON COUNTS FOUR, FIVE and SIX

(Tr. of 4/25/61, pp. 175-193, on Directing Verdict)

THE COURT: Members of the Jury, we have heard the evidence with regard to the Fourth, Fifth and Sixth Counts of the complaint in this case for the last few days, and as to the first three counts you will recall that the matter was submitted to you under instructions from the Court for your findings as to the first three counts, and your findings as to the first three counts, and your findings have been made and recorded. Yesterday and today the evidence has related to Counts Four, Five and Six of the complaint. Now, at the conclusion of the evidence on those counts, the counsel for the defendants have submitted a motion to the Court to instruct the Jury that there is no evidence in the case legally sufficient on which to base a finding against any of the defendants in this case named in those three counts, Four, Five and Six; and after consideration of the matter, I have concluded that those motions must be granted, therefore, I have to instruct you that under the rulings of the Court, you should find a verdict for the defendants with regard to Counts Four, Five and Six.

I will not detain you with a long explanation of why I have reached that conclusion as a matter of law. It proceeds on the assumption that considering all the evidence in the case on behalf of the plaintiff, supplemented, if necessary, by evidence on behalf of the defendants, that the Court does not find any issue of fact to be submitted to the Jury and, therefore, the Court is obliged under our rules of procedure which have existed in the federal courts for many years, for the court to assume the responsibility

of determining as a matter of law that the plaintiffs are not entitled to recover under these three counts, Four, Five and Six, and I have granted the motions of the defendants to that effect. Now, I will state to you briefly the substance of the case. When a Judge says he can find no evidence on certain points, he means, of course, that on the points that are vital to the plaintiff's right of recovery, there is no evidence, considering the evidence in the light most favorable to the plaintiff, to allow a verdict against the defendants. Therefore, in a way, the findings of the Judge, as a matter of law, are negative in character, but nevertheless, they are the law that would govern you in this case. Now, the substance of this case, very briefly stated, is this, in 1954, the District Supply Company was engaged in business and Mr. Shroyer was an officer of that company. He retired from that office and other representatives of the District Supply Company claimed to be a creditor of Mr. Shroyer in an amount varying from a few thousand to twenty odd thousand dollars.

Mr. Shroyer owned a residence property in or near Hyattsville, I think, in Maryland, and the District Supply Company began an equity suit in the Circuit Court for Montgomery County, Maryland, (to enjoin from selling and) to impress a trust on the property in favor of the District Supply Company. That's a well known form of equity proceeding where the creditor is seeking to enjoin the owner of property from disposing of the property and, in the meantime, or ultimately, to have it adjudicated that the creditor is entitled to a right to be satisfied, to some extent, at least, from that property. Now, while that suit was pending in Montgomery County, or shortly thereafter, back in 1954, Mr. Shroyer had an offer to sell his property and he got a satisfactory offer, said to have been about

thirty to thirty-five thousand dollars. The contract to purchase was made—a contract of sale and purchase was made, and the purchaser instructed the title company to make an examination of the title to see if the title to the property was good. I won't stop to tell some of you who may not be familiar with the searching of titles, but that's the way in which the prudent purchaser proceeds when he buys real estate, he wants to know if he is getting a good title to the property.

Now, the Title Investment Company in this case, of which Mr. Christopher is the Secretary, both of which are defendants in the case, was employed to examine the title, and when they were examining the title, they found it was good on the land records except there was this pending suit against the owner of the property, Mr. Shroyer (and Mrs. Shroyer), and which matter constituted a lien, ultimately, on the property, so that the title company refused to insure the title, guarantee it as a good title, but the parties then entered into some negotiations as to what could be done to cure the defects, and it was agreed that the net proceeds of the sale of the property, which amounted to about $17,000.00 after paying off some prior mortgages, should be held in escrow by the title company pending the outcome of the suit, for the settlement of the suit or the orders of the Circuit Court for Montgomery County. That was the beginning of the matter and that is the proper understanding of the fund which was called the escrow fund and about which so much of the plaintiff's testimony in this case has revolved.

Now, Mr. Shroyer employed a Mr.—the plaintiff in this case, Mr. Maddox, to represent him and defend him in this equity suit; that was in the early part of 1954, and various

things occurred in the progress of that case in Montgomery County over the next two years. Now, there has been a good deal of evidence as to why the case was delayed, and so on. I think it is unnecessary to go into that. In the meantime, however, it appears that Mr.—the District Supply Company was pressing for something to be done on its claim, and at one time, they referred the matter, it appears, to the United States Attorney for the District of Columbia and after quite some time, the District Attorney indicated that he would submit the matter to a Grand Jury and that possibly an indictment might result, whereupon, Mr. Shroyer also employed Mr. Maddox back in 1954, also, to represent him in that matter. Then again later on, Mr. Maddox was involved, engaged—Mr. Shroyer was engaged in some company known as the Ray Supply Company. After he had gotten out of representing the District Supply Company, apparently, he went in this other business of Ray Supply Company and it, apparently, was involved in difficulties of one kind or another, and Mr. Maddox was also employed to represent Mr. Shroyer in that.

Now then, you heard all last week a great deal of testimony lasting all five days relating to Mr. Maddox's claim for compensation as a lawyer for his services in those three employments, and there is evidence throughout here, which is really not contradicted on that point, that Mr. Shroyer and Mrs. Shroyer were very much exercised about the lack of progress in the settlement of the claim of the District Supply Company, and about September, the fifteenth, I think, 1956, two years later, they, in writing, notified Mr. Maddox that he was dismissed from further representing them in the cases and Mr. Maddox, very properly, after receiving notice of that kind, entered his—made a motion in the Circuit Court from

Montgomery County in which he had been acting for the Shroyers, to strike out his appearance as he was no longer authorized to represent them, and that was granted by the Court on his motion. But later, (on the same date) maybe a few weeks later, Mr. Maddox then filed a petition asking that he be allowed to intervene in the case and participate in the further development of the case on setting up the fact that during the course of his representation of the Shroyers, they had given him one or more assignments with respect to this escrow fund, and the case then went on various motions, and so on, in Montgomery County, but again, did not come to a final disposition until 1959.

In the meantime, however, the criminal case that resulted in indictment and after some months, the indictment was dismissed by the motion of the United States Attorney, but the equity case still ran on. The escrow fund was still being held by the title company and there were various proceedings in that case by the various parties and efforts to bring it to a conclusion. Apparently one of the Judges to whom matters had been addressed had to take, or did take, a prolonged vacation, the case was then transferred by the Chief Judge of that Circuit to another Judge to hear (rehear). And finally, I think in 1959, or thereabouts, the title company came into court and suggested the Court should take jurisdiction of this fund. Apparently, no action was actually ever taken on that, still a little later, the District Supply Company, represented to the Court that after new counsel had been engaged by the Shroyers, that a settlement of the claim had been arrived at and that the claim was liquidated and agreed to on both sides as to $11,500.00, and the Court was asked to authorize and approve the settlement.

It appears that Mr. Maddox objected to the settlement, but the Court overruled him and wrote a written opinion in the matter, which I have read together with a great majority, also, of all the other pleadings and proceedings in that case in Montgomery County, and the Court approved the settlement. The final result of it all was that the District Supply Company was paid this $11,500.00 from the fund in escrow, and some other judgment creditors of Mr. Shroyer were satisfied after they had made some attachments of one kind or another, and there was a comparatively small balance of the fund which was paid over, I think, to Mr. Shroyer. Now, we are much aided in the understanding of this whole matter by the fact that after the Court had overruled Mr. Maddox' protest against the settlement or disbursement of the escrow fund, Mr. Maddox took an appeal to the Maryland Court of Appeals.

Now, the reason we are trying this case in this federal court, it involves no question of federal law, as such, but the Constitution of the United States provides that where a case arises between citizens of different states, either party has a right to bring the suit in the federal court. That was a provision of the Federal Constitution of 1789. Mr. Maddox is a Washington lawyer and a resident of Washington. Some years ago in 1940, Congress passed a law saying that while the District of Columbia was not a state and that the residents were not citizens, nevertheless, they were entitled to have, according to the view of Congress, the right to appeal to the federal courts as they were citizens of different states. Now, that is the reason the Case is in this federal court. The Supreme Court, I may say, some years later, upheld that Act of Congress, giving access to the federal courts by citizens or residents of the District of Columbia. It also appears

in connection with the fact the jurisdiction of this Court is based only on diversity of citizenship, that the Court here is obliged to follow the rulings or the law made by the State of Maryland because this Court is a District Court of the United States for the District of Maryland, therefore, when you have a case where the jurisdiction of this Court is based only on diversity of citizenship, you must follow the law of Maryland. So, as I say, I have been aided in understanding much of this case by the decision of the Maryland Court of Appeals on Mr. Maddox' appeal to the Maryland Court of Appeals, and the Maryland Court of Appeals overruled Mr. Maddox' contentions in that case and affirmed the orders of the District Court—of the Circuit Court for Montgomery County. The case is entitled Maddox versus District Supply, Incorporated, reported in 222 Md. at page 31. Mr. Maddox filed a motion for re-argument in that case and that was denied on May 19, 1960, and Mr. Maddox, as he had a right to do, applied to the Supreme Court of the United States to review, on what we call certiorari, the ruling of the Maryland Court of Appeals, and the Supreme Court denied that application for certiorari on October 24, 1960, reported in 364 U.S. 872.

Now, in the opinion of the Maryland Court of Appeals written, I think, by Judge H. (Henderson)—what is his name? Well, in the opinion, it was pointed out that Mr. Maddox did not have a right in the fund as such, and that a lawyer does not attain a lien upon his client's property merely by virtue of performing services even when he has been discharged. A client has a right to discharge a lawyer, as I instructed you in your consideration of the first three counts, at any time, with or without cause. If he is discharged without cause, then he has a right to recover

the proper amount of damages or fees he has reasonably earned upon suing the client. So, it was suggested in the Maryland Court of Appeals that Mr. Maddox had a right to sue the client under what is known as a quantum meruit, a Latin phrase which means, how much the services are worth, as applied to this case. That, Mr. Maddox has done. On that part of the case, in this case, the first three counts you have heard full testimony for several days, and you rendered your decision and the effect of the decision, as reported by you, was not to award Mr. Maddox any further compensation than (what) the clients had already paid him. Therefore, it appears that the large part of the case which is here has been acted on in accordance with the suggestion of the Maryland Court of Appeals, that the remedy Mr. Maddox had was to sue for a reasonable fee for the services he had to perform.

Now, with regard to Counts Four, Five and Six, which you may have heard read to you or, at least, have been explained, but possibly not in much detail, and I think I should not detain you by a long technical explanation of the precise terms of the charges made there, but in substances, they are, first, as to the Fourth Count, that there are several defendants here, Mr. Meatyard and Mr. Christopher and a Mr. Osborne, a minister, conspired together with the Shroyers to have Mr. Maddox dismissed. Now, I have critically looked at the testimony that has been offered from time to time on that point, and I just do not find any evidence that any of these people conspired with each other or with Shroyer or with other people to have Mr. Maddox dismissed. The only testimony that you have on the point directly from witnesses is that the Shroyers decided on their own volition that in view of the delay which had occurred in two years and the money

they had already paid to Mr. Maddox, that they were dissatisfied with his services and they so notified him in writing, and his contention was that he was entitled to a very much larger sum than had been paid him. Now, therefore, when you look at the positive evidence in the case as to existence of a conspiracy to have the Shroyers dismiss Mr. Maddox without just cause, we find that the only positive evidence on the point is that of the Shroyers.

So far as Meatyard and Christopher are concerned, or the company that Mr. Christopher represents, there just isn't any evidence that any of them took any part whatever in inducing, or persuading or suggesting to Mr. Shroyer or Mrs. Shroyer that they dismiss their attorney. When they made up their minds, according to the testimony, to dismiss Mr. Maddox, they consulted with their minister, or the minister who is nearby them, Mr. Osborne. Now, I do not find in all the evidence with regard to Mr. Osborne that he had any wilful, personal intention of meddling in their affairs. They came to him, as they explained it, because they were much distressed about their situation, they had no prior acquaintance with Mr. Maddox before the time they employed him, they had been referred to Mr. Maddox by someone representing the District of Columbia Bar Association, and they, apparently, did not know other lawyers. At all events, Mr. Osborne, thus appealed to, suggested that he knew a lawyer who had been active, and apparently very satisfactory, in Church affairs, and suggested a Mr. Beatty, and Mr. Beatty did not accept the case, and Beatty, however, referred the Shroyers to some other lawyer who, in turn, did not accept the case, and finally, the still further lawyer, a Mr. Hilland, or some name like that, who has not testified in the case as a witness, but we have heard a bit about him, was substituted as

counsel, and he, in a few months after he was employed, was effective in arranging for a settlement of the claim of the District Supply Company for $11,500.00. Now, it is also contended by Mr. Maddox in the Fourth Count of the complaint that there was an abuse (a malicious abuse) of legal process by virtue of proceedings that had happened from time to time in Montgomery County. I have tried to give careful attention to the evidence relating to the alleged abuse of process, and I do not find it in the case. True, there were motions at various times made by various parties. Mr. Maddox complains that on some of them he was required to make certain trips to some places in and around Montgomery County, presumably Rockville, and that that was an inconvenience to him and unnecessary, but according to legal procedure, after Mr. Maddox had intervened in the case, after previously striking out his appearance, by coming in and intervening as a creditor with rights, alleged rights in this escrow fund, motions that had to be made and notices which had to be given, included Mr. Maddox, that was necessary for the ordinary purposes of the progress in the case, and I can find no semblance of evidence to show that there was anything malicious in the matter.

Indeed, the evidence I have heard is all consistent with the understanding that each of the parties to that case were respectably pursuing their own rights and remedies and advancing their own interest and not tending to harass Mr. Maddox, particularly, but as he appeared as an adverse party at that time, the notices had to be given to him. Now, as to the several parties in the case regarding abuse of process, as I say, the evidence is consistent with the idea that Meatyard, as attorney for District Supply, was trying to get money for his client, and Mr. Christopher,

as secretary of this investment company, was trying to protect his own company with regard to the disposition of that escrow fund, which he had to have in-tact and be disbursed only by a satisfactory disposition or dismissal of the equity suit, or by an order of the Court. If he didn't keep that property for himself and it was dissipated and paid to somebody other than the District Supply Company, or others who might be entitled to any surplus over and above the claim of the District Supply Company, then the purchaser of the property might come back on the Title Investment Company, and Mr. Christopher, also, possibly, for damages for breach of their contract to insure the title against all adverse claims. So that I have not been able to find affirmatively in the case any basis for the contention that there was malicious abuse of process as a result of the conspiracy, and while Mr. Maddox has argued quite extensively, and with a good deal of conviction, that you can put together a great many small pieces of evidence for the purpose of fragmentarily showing a conclusion of malicious abuse of process, I have not been able, by putting them all together in a mosaic of one kind or another, or cumulatively, to find that they amount in legal understanding to the conclusion which Mr. Maddox seeks to have impressed upon them. A column of zeros, of course, would add up to zero; and a column of feathers would, perhaps, not add up to a pound. I have not been unmindful of Mr. Maddox contention that by reason of his ability in staving off what he called any adverse decision against the Shroyers for two years, that other people wanted to get rid of him, to get him out of the way, that he was there, therein, in the flesh, their obstacle, and it was in order to get him out of the way that they combined to have him dismissed and combined to harass him even after he had been dismissed.

I just do not find any evidence to justify that conclusion. I think it a figment of suspicion, not supported by adequate proof in the case. Mr. Maddox also contended in the Fifth Count, particularly, of the complaint that the Title Investment Company had converted to its own use some of this escrow fund. Now, you have heard the evidence on that, the original holding of the escrow fund was for the purpose of protecting the investment company against the possible claim of the purchaser of the Shroyer property, and you have heard the evidence as to just what disposition was made of that fund. It is true, none of it is paid over to Mr. Maddox, and Mr. Maddox contends that it is, therefore, converted to the use of the title company (or Shroyers). Well, by that he means that they made an improper distribution of the money, but it was a part of the escrow fund in its original creation that it should be disbursed after the settlement of the case, implying, of course, as I understand it, the dismissal of the case, so that there would be no further claim by the District Supply Company and—or as the escrow fund provided by an order of Court, and you have seen on the evidence that Mr. Christopher made the disposition in accordance with the orders of the Court, so that I am not able to find that there was any conspiracy with regard to that, nor was there any unlawful conversion of the money to the benefit of the Title Investment Company.

Now, with regard to the Fifth (Sixth) Count in the complaint, that again is more particularly a conspiracy for the abuse of process in this equity suit, and I have not been able to find that there is any evidence which would show any malicious, wrongful abuse of process in the conduct of that case (count). As I say, all the proceedings in the case that I have heard in evidence, or examined, or

understand from the Maryland Court of Appeals decision, and to the effect that the parties were pursuing their own respective interests as they had a right to do. Mr. Maddox also claims a conspiracy or abuse of process in regard to his interest in the escrow fund. Now, the escrow fund was primarily impressed with a trust which you have heard read. It was to be held until the dismissal of the District Supply Company suit for which it was a guarantee. It was a substitution, therefore, in legal effect, of the escrow fund for the property itself and the Maryland Court of Appeals has held in the case I referred to that Mr. Maddox' legal interest in the fund itself could not be maintained. The Court had to hold that because Mr. Maddox was in the court complaining that his rights had been interfered with in respect to this fund, to which he claimed to have an assignment from the Shroyers, and the Court of Appeals pointed out, for reasons there of a technical nature, so far as laymen are concerned, why that would not be—claim could not be maintained, but as I say, they did suggest Mr. Maddox had a right to have adequate compensation for his services.

The Court of Appeals did not have before them any evidence bearing on the question of why Mr. Maddox had been dismissed by the Shroyers, therefore, nothing said by the Maryland Court of Appeals was in derogation of Mr. Maddox' right to have that question of compensation, under all the circumstances, decided by a Jury. He has had that and I think, therefore, there is nothing further, in the case which would entitle him to recover under the Fourth, Fifth and Sixth Counts of the complaint, and for these reasons, I have granted the motion of the defendants, respectively, to that effect. And the final consequence is that under the instructions of the Court, the Jury, Judge

takes the responsibility of the matter, and of course, there will be an opportunity for appeal, if desired, the Court having taken the responsibility tells the jury as to the remainder of the case, you should find a verdict for the several defendants. Take the verdict, Mr. Graham.

*** THE CLERK: (Tr. 194)—find for the defendants upon the issues joined in the Fourth, Fifth and Sixth Counts, as instructed by the Court *** Verdict recorded.

THE COURT: One thing the Clerk calls to my attention, there was a motion to make an amendment of some one of the pleadings in the case. As I indicated earlier in the day, I was considering that, and I grant the amendment.

MR. MADDOX: I except to that, Your Honor. **** I except to that granting the amendment at this time (Tr. TR., p. 194, 4/25/61). ***

APPENDIX D

Section 1 of the *14th Amendment to the Constitution of the United States* (U.S. Const. Amend., Part 3, p. 2) provides:

> "*** No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any citizen of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be *** deprived of life, liberty or property without due process of law ***"

RULES OF CIVIL PROCEDURE:

Rule 16 (FRCP). Pre-trial Procedure; Formulating Issues. In any action, the court may, in its discretion direct the attorneys for the parties to appear before him for a conference to consider (1) The simplification of the issues; (2) The necessity or desirability of amendments to the pleadings; *** (6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of *** The Court may in its discretion establish by rule a pre-trial calendar ***

Rule 26 (FRCP). Depositions Pending Action. (a) *** Any party may take the testimony of any person, including a party, by deposition upon oral examination *** for purpose of discovery or use as evidence in the action or for both purposes ***

Rule 33 (FRCP). Interrogatories to Parties. Any party may serve upon any adverse party written interrogatories to be answered by the party served *** who shall furnish such information as is available to the party. *** The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them. *** Interrogatories may relate to any matters which can be inquired under Rule 26(b) for the use of the deposition of a party. *** The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires ***

Rule 34 (FRCP). Discovery and Production of Documents and Things for Inspection, etc. Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters *** which constitute or contain evidence relating to any matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody or control; ***

Rule 45 (FRCP). Subpoena. (b) *For Production of Documentary Evidence.* A subpoena may also command the person to whom it is directed to produce the books, papers,

documents, or tangible things designated therein; but the court upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena **

(f) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 169.

(Formerly No. 1029)
(October Term, 1961)

LUTHER ROBINSON MADDOX,
Petitioner,

vs.

FIDELITY INVESTMENT & TITLE CO., INC., and JAMES C. CHRISTOPHER, AS SECRETARY THEREOF and INDIVIDUALLY; F. ARCHIE MEATYARD, JR., INDIVIDUALLY and AS ATTORNEY FOR DISTRICT SUPPLY, INC., ET AL.; OWEN E. OSBORNE, RAYMOND O. SHROYER and MARY K. SHROYER, His Wife,
Respondents.

PETITION FOR A RECONSIDERATION OF, AND A REHEARING ON, ORDER OF OCTOBER 8, 1962, DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LUTHER ROBINSON MADDOX, *Pro Se,*
525 Woodward Building,
Washington 5, D.C.
(Phones: DI 7-2323; CO 5-4111)

DATED: November 2, 1962.

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PETITION FOR A RECONSIDERATION OF, AND A REHEARING ON, ORDER OF OCTOBER 8, 1962, DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Luther Robinson Maddox, moves this Honorable Court to vacate its Order of October 8, 1962, denying his Petition for a Writ of Certiorari, in the above-entitled cause, and to grant him a Reconsideration of and a Re-

hearing thereon, pursuant to Rule 58(2) of this Court, for the following reasons and on grounds which were available to Petitioner or have in the meantime intervened —and by him not presented previously, or were not presented properly.

I.—

THE LATE JUDGE CHESNUT OF THE TRIAL COURT WAS HIGHLY BIASED AND PREJUDICED AGAINST PETITIONER, THROUGHOUT THE PROCEEDINGS IN THIS CASE, IN FAVOR OF THE RESPONDENTS, ESPECIALLY SO WITH RESPECT TO MEATYARD AND CHRISTOPHER.

Meatyard was a United States Commissioner in Montgomery County, Maryland, and was appointed as such by that Court. The records and files before this Court show plainly that the Trial Judge could not hear very well what was said at times in hearings and even made rulings when he stated that he did not hear the question *but would sustain the objection anyway*. The record, in instant case, is long and filled up with facts that show the Trial Court's bias and prejudice and that he did not provide Petitioner with a fair and impartial trial and hearings as the law requires. He acted at times as attorney for Respondents, and in many instances, he asked for objections to questions so he might sustain them. The late Judge Chesnut was eighty-eight years old when this case was tried before him and his THIRTEEN-PAGE instructions to the jury, on why he was directing a verdict on Counts FOUR, FIVE and SIX, speaks for itself (pp. 80-93 in Appellant's Brief filed with this Court, and see Original Transcript of Trial on 4/25/61, pp. 175-195; with VER-

DICT). It is suggested and requested that this Court read carefully these instructions with the VERDICT OF JURY thereon for the proper picture—and that the SIXTH COUNT was allowed to be amended by Meatyard, *after the verdict*, on this Count when no issue was, or had been, made by him. There was no issue before the Trial Court, yet the Jury brought in a verdict upon direction by the Trial Court. *This was certainly a most extraordinary proceeding.* It was common knowledge around his Court that the late Judge Chesnut could not hear very well and this fact—that he couldn't hear very well—prejudiced the Petitioner's case throughout the proceedings before him.

See Transcript of Meatyard's Testimony, as a hostile witness, on 4/24/61, (page 129), where the following appears: (THE COURT;) *"I sustain the objection, I don't know what the question is."* In many places in the Transcript of the testimony of witnesses, the Trial Court is shown to be that he could not hear very well, and where he asked for a repetition of what had been said. *The entire testimony of Meatyard and Christopher should have gone to the jury on the questions of fact*, in the face of conflicting inferences of fact therein and their three decades, or more, of intimate friendship. The Trial Court could not pass on such inferences of fact as here shown and which conflicted to the Nth degree. This case was a Tort Action for a conspiracy, with great damages involved, to breach contracts of employment between an attorney and his clients, and under such conditions as existed in this case, great latitude in admitting evidence should have been allowed. Fraud was also charged.

In a very recent case, *Hernandez* v. *U.S.* (9CA. 1962), 300 F. 2d 114, the general law on conspiracy has been most

clearly set out. The *Connally Case* (7CA, 1954), 162 F. 2d 428, shown in original Petition for Writ, clearly applies also to a situation like this, where intimate connections and relationship of alleged conspirators exist—and the records show it. In the *Hernandez Case*, it was held: Under the general law of conspiracy common course of conduct between a defendant and a third person need not be based on express agreement and existence of common scheme or fact of defendant's participation in it need not be proved by direct evidence *and both may be inferred from a development and collocation of circumstances*. Then, at page 122, that Court said:

> "Once it is found that the defendant was connected with the conspiracy, he is equally liable with all those who originated and dominated the common scheme, though he joined it after its inception and his part was minor and subordinate. He is responsible not only for the acts of the co-conspirators in furtherance of the conspiracy following his joinder, but also for purposes that preceded it. Moreover, he is liable for the acts of his co-conspirators though he was not aware of the performance of those acts, *nor even of the existence of the actors.*"

This *Hernandez Case* was a criminal case, but it is elementary law that the rules of evidence applicable in criminal prosecution for conspiracy are likewise as effective in all civil cases for conspiracy where damages are claimed (11 Am. Jur., Section 56—Evidence). See also *Isaac* v. *U.S.* (8CA, 1962), 301 F. 2d 706, holding same as *Hernandez Case*. Moreover, this Court must have overlooked, certainly, the *Connally Case* (7CA, 1947), 162 F. 2d 428, set out on page 16 of original Petition, filed June 11, 1962, showing very clearly what the law is on the

individual and collective interests of alleged conspirators, their situation, intimacy and relationship. On that same page were shown the *Sartor and Gypsum Company Cases*, which must have been overlooked also. These two latter cases were decided in this Court.

See Transcript of Meatyard's Testimony, at Trial 4/24/61, pages 87, 88, 89, 95-97, 99, 101, and 104, particularly where Court says: *"You answer it—you would know better than Meatyard"*; also, pages 108, 112, 114-120, 123, 124, 125, 134, 135, 141-143. *At pages* 87, 88, *Judge Chesnut* said that exceptions and reprimands should be applied equally to both sides, *but the record itself does not show that it was applied equally. At pages* 95 *and* 96, there is a clear showing of Trial Court being biased and prejudiced in favor of Meatyard. *At page* 98, record shows Meatyard evading as to when State Court took jurisdiction of Equity Case, and Trial Court suggests that Maddox inform him. *At page* 99, Judge Chesnut sustains Taylor's objection to bringing out the truth in the case. *And at page* 101, *Judge Chesnut tells Meatyard how to answer questions. Again, at page* 108, Judge sustains Taylor's objection, showing plainly bias and prejudice, etc. *At pages* 112, 113, Trial Court says he does not see what Maddox is driving at and refuses to allow the underlying facts of the conspiracy to be brought out. *And at page* 114, Meatyard admits the hearings before Anderson, Circuit Judge, on *July* 31 *and August* 6, 1956, *after much hammering at him by Maddox*, where he says Maddox's offer to settle all matters was a trifling amount of some $1,000 or $1,500, which was untrue and could have been rebutted if the case had been adjourned on April 25, 1961, until the next day. But Judge Chesnut was determined as the record shows plainly, to finish the case by directing a verdict that day (25th).

At page 115, Meatyard testified he was sure that Carlin, his law-partner, was never at any of the hearings in that Equity Suit against the Shroyers, but Carlin himself testified that he was present at one of the depositions taken by them of the Shroyers, about February 1956, which depositions were never filed in that equity case. *At page* 116, Meatyard's testimony is that he did not know why his letter dated September 12, 1956, purporting to carry out his promise of August 6, 1956, to Maddox, was not posted until September 17, 1956, after Maddox had received Shroyers' letter of same date on the 15th, discharging Maddox from all further connections with Shroyers' matters. *On same page*, Court sustains Taylor's objection, showing bias and prejudice: *"I did not hear all that Mr. Maddox said, but I think I heard enough to say I will sustain the objection." At page* 117, Transcript shows Court doesn't hear Meatyard. *At page* 118, Meatyard recalls clearly what he wants to recall at the conference in Galiher's office about February, 1957, when agreement was reached as to dismissing criminal case against Shroyer, charging embezzlement of funds of the District Supply, Inc., but could not recall Mrs. Shroyer fainting and being carried from the conference room by someone, as she testified in her deposition taken in Baltimore on 5/2/59 (pp. 56, 57).

At page 120, there is shown Meatyard says he did not know on September 12, 1956, that the Shroyers had intended to discharge Maddox from their employment. And *at page* 123, there is shown:

> "A. You asked me that in a deposition and I haven't seen a cancelled check of the Shroyers. THE COURT: Mr. Meatyard, I just don't hear you, please talk louder. THE WITNESS: All right, sir. No, I

haven't seen a cancelled check of the Shroyers. I think Mrs. Shroyer, at one time when we were *at the first meeting in Rockville* (in March, 1957), she mentioned to me she could show me cancelled checks for that amount, *but I never saw them.*"

And at page 124,

"THE COURT: *When was that, some time in* 1959? THE WITNESS: *I think it was* 1959, sir. BY MR. ADDOX: You don't remember the telephone conversation somewhere about the end of September, 1956, that I am referring to pursuant to this letter of mine of September 20, 1956, saying how (that) I would get in touch with you soon? A. *No, I don't remember that.* Q. Would you deny you talked to me over the telephone at that time? A. In September? Q. *About the end of September, a short time after September 20,* 1956. A. *I don't remember talking to you then, no sir.* Q. *Would you deny you talked to me?* A. I am not going to say deny or not, you may have called me. I don't know, but I don't remember talking to you. Q. *Do you remember what you said in your deposition down in Washington about that?* A. *No.*"

In deposition in Washington, taken on March 7, 1960, Meatyard testified (p. 67):

"Q. Did you not tell me, Mr. Meatyard, a short time after that letter of mine to you, dated September 20, 1956, which is a part of Plaintiff's Exhibit No. 1 for identification, over the telephone, that Shroyer had shown you cancelled checks where he had paid

this Plaintiff, myself, for fees and services, in an amount of $4,000, as his attorney, and that you felt that amount overpaid this plaintiff, or you stated words to that effect, didn't you? A. *That is a fabrication, Mr. Maddox.* Q. That is not true? You didn't talk to me over the telephone about checks, is that it? A. *About his fees—your fees? No.*"

At page 125,

"Before Judge Schnauffer?

A. I think we had two hearings out there, Mr. Maddox, I think we had two hearings out there on the same petition to settle and it was at the first one we had. *It was not before Judge Schnauffer, I am sure.*" (March 20, 1957).

At pages 134, 135, *there appears:*

"MR. MADDOX: I am asking if he and the Shroyers, and Hilland representing the Shroyers, didn't file a petition on May 9, 1957, *to have the power of attorney and the assignment rescinded and annulled on account of fraud and duress* into (in the) execution of it. THE COURT: Do you know whether he did or not? BY MR. MADDOX: Yes or no, and then explain it, if you wish. A. Mr. Mack, I hate to bring in another name, *but Mr. Mack is Mr. Hilland's partner*, and Mr. Mack filed the pleading you are speaking of, I am sure. *To my knowledge, I had no previous notice he was filing that. I got a copy of it and I attended the hearing on it, but I don't think I was a party to that pleading.* *** Q. Didn't you write Hilland a letter and give him author-

ities, and so forth, to support his position in that matter? A. I gave him some authorities I had, yes, sir, that I was going to use against you myself. Q. And before that paper was filed? A. *That's right—wait, I gave him that before the paper was filed? No, I sent the letter before the hearing, I am sure.* Q. *When did you know they were going to file that paper?* A. *I told you, I don't think I had previous notice they were going to file it.*"

See Meatyard's Answer to Interrogatory No. 23, sworn to on January 5, 1960, in this case, where he said: Mack called him by telephone a day or two before May 9, 1957 (and said) *that he was going to file it*: "23. I don't think so, *except that Mr. Mack, of Hilland's office, I believe, telephoned me to say that he was filing such a petition a day or two before he did so.*" (This was in answer to the question as to whether or not he had had any discussions, etc., with Hilland about filing such a petition before it was filed).

On pages 135 *et seq.*, Court shows great bias and prejudice against this Petitioner and in favor of Respondents. *And at page* 142, *Court again cannot hear.* "THE COURT: I did not catch the whole question: I hear generally what the question is, but I miss some of the vital words, which controls, very often, my ruling on the evidence. The jury perhaps would not understand how necessary it is for me to hear every word and to hear it distinctly because sometimes missing a word defeats the purpose of the ruling." This is an admission by Judge Chesnut that he cannot hear very well and consequently shows very clearly that throughout the trial of this case, Petitioner has been greatly prejudiced and injured by his

failure to hear well. Thus, the great bias and prejudice shown by the record, throughout the proceedings before this late-88-year-old Judge, is conclusive that Petitioner has not had a *fair and impartial trial of this case, and* that his rulings have been bad.

See Transcript of Testimony of Meatyard of 4/25/61 (at trial): (p. 143)

"MR. MADDOX: I am asking Mr. Meatyard, your Honor, if he remembers the conversation he had with me over the telephone with me about the 21st day of September, 1956, as to the status of the equity case down at Rockville pursuant to my letter —pursuant to his (my) letter of the twentieth. THE COURT: Can you answer? THE WITNESS: He asked me that question yesterday, your Honor, *I don't specifically remember a telephone conversation—that particular date or any date right in there.* BY MR. MADDOX: Would you deny having a telephone conversation with me? A. No, sir. I don't know when it was, but I told you I would not talk to you on the telephone on any occasion in the future. When I told you that, I don't know. But I will not talk to you on the telephone. Q. Would you tell me that date you (said you) wouldn't talk to me on the telephone any time in the future? A. I don't remember, but that's when I told you that I wouldn't discuss anything on the phone with you. Q. *When did you tell me that?* A. *Mr. Maddox, I don't know.* Q. Well do you know you ever told me that (p. 144)? A. *I am sure I did.* Q. Wasn't (that) the time you told me you had seen the $4,000.00 checks cancelled that had been paid me for fees? A. I have never told you I saw the

checks for $4,000.00 because I have never seen them. Q. Didn't you tell me at that time that the equity case was all settled, wiped clean? Does that sound like your words? A. On what day in September? Q. About the twentieth of September. A. *I could not have said it because it was not at that time.* Q. Or shortly after, it was not (as) far up ahead as October, it was my suggestion in that letter, if you remember, read to the jury, it stated I would advise you further or get in touch with you further, in effect. A. *I remember receiving the letter, yes, sir.* Q. And I got in touch with you as a result of that? A. Maybe you did. Q. But you don't remember that conversation? A. *No, sir, I do not remember that conversation. I don't monitor my calls, Mr. Maddox.* I think when I talk to a lawyer, I am talking to somebody I can talk to on open terms and I can't talk to you. Q. Didn't you in your deposition say that you never talked to me on the telephone about that time pursuant to that letter? (p. 145) *** (colloquy with Court) THE WITNESS: MR. MADDOX: *I do not remember talking to you at that time, no, sir.*"

BY MR. MADDOX: Q. But you did have it fixed up with Mr. Christopher here, your old friend *of twenty or thirty years standing?* A. I am very proud of it." *Pp.* 146-161 *Transcript shows bias and prejudice against Petitioner.*

Meatyard and Christopher, in their Testimony tried to convey the idea that they had never talked to each other about these matters but two or three times and that over the telephone. But Meatyard's answer to Interrogatory No. 15, sworn to on January 5, 1960, shows: "15. We have undoubtedly discussed this matter on *in-*

numerable occasions, but no details of our discussions, or dates, come to mind.". In answer to Interrogatory 16, Meatyard said: "I feel that Christopher is entitled to a fee *** *though the matter is of no particular importance to me*": (An old friend of some thirty years standing and of which he is very proud). These conflicting inferences of fact between old friends and conspirators of some thirty years standing, without nothing more, *justified this case going to the jury for a verdict*—without anything more, under *Sartor, Connally and Gypsum Cases*. Undoubtedly, they were overlooked by this Court.

See pages of Transcript of Proceedings before the late Judge Chesnut, where is shown bias and prejudice in his rulings: (Pp. 6-11) He asks the question why should he punish Shroyer for not producing checks when he had been ordered to produce them and he refused to hold him in contempt (both him and Christopher, pp. 10, 11). *On page 26, Court asks Taylor how about the* $500 *assignment by Christopher to be paid to Maddox.*

On pages 21, 22 is shown that Judge Chesnut does not hear Taylor. And at pages 36, 37, he says he does not understand why Maddox is pressing case against Osborne (the Clergyman who wrote the letter of August 28, 1956, to Shroyers *directing that they get his lawyer to represent them*, before Maddox was out of the case on September 15, 1956). *And at page 47, is shown where Court refused to let Maddox argue as to Osborne.* "MR. MADDOX: May I say a word? THE COURT: *No, Mr. Maddox, I am sorry, I can't. I must conclude.*" *And at page 47, is shown where Court refused to extend Trial Date and says "must endure long trials."* But the Trial Judge cut the "long trial" short on the conspiracy counts of Four, Five and six *at*

the end of two days and refused to hear other witnesses who had been subpoenaed for the following days of 26th and 27th . . . . and another important and material witness who was ill at that time, who could have later been gotten into court to rebut many statements made falsely by certain respondents, or her deposition taken, to the same effect.

The fact that the late Judge Chesnut refused to grant Petitioner a Pre-trial Hearing upon proper notice was highly damaging and prejudicial to Petitioner. See pages 4, 5, 6, (Tr. Proceedings—of 3/17/61, R. 330), where Sherbow representing Shroyers *attempted to get a Pre-Trial Hearing and appeared before Trial Judge Chesnut and Thomsen, C.J., without Petitioner being notified.* Judge Chesnut here says Sherbow and Doyle appeared before him in Chambers and submitted a Petition to Thomsen, C.J., Re Pretrial Proceedings; but Petitioner never received a copy of such Petition nor did he know anything about the matter until Judge Chesnut from the Bench on this date referred to it.

II.—

THE LATE JUDGE CHESNUT RULED THAT CHRISTOPHER'S, MEATYARD'S, OSBORNE'S AND THE SHROYERS' DEPOSITIONS COULD NOT BE READ INTO EVIDENCE AT THE TRIAL, BECAUSE THEY WERE TAKEN IN A COMPANION CASE FILED IN THE DISTRICT OF COLUMBIA.

Osborne's Testimony at the trial and his deposition taken in the District of Columbia on August 31, 1959, were highly contradictory. Caliher and Donnelly represented him

on that date. He even changed his testimony in this deposition after it was transcribed in places from negative to positive, and from positive to negative, on material matters without Petitioner being allowed to question him further. Judge Chesnut, as above shown, was positively prejudiced in his favor. His testimony and that of the Shroyers were highly contradictory in places. See *Aetna Insurance Co.* v. *Paddock* (5CA, 1962), 301 F. 2d 807, on Bias and Prejudice of witnesses. In *Powers* v. *Continental Can Co.* (8CA, 1962), 301 F.2d 386, it was held: Jury has function to determine credibility of witnesses and weight to be given their testimony. In the instant case, the late Judge Chesnut, an 88-year old Judge, passed on the credibility of the witnesses and the weight to be given their testimony. This is, of course, contrary to the holdings in practically all of the Circuits. These alleged conspirators were all Marylanders *and Meatyard, Christopher, Galiher, Hilland and Mack;* were old friends practicing law in Montgomery County. *Hilland and Mack* could not be reached to testify in the trial of this case, *although subpoenaed twice*, and Marshall could not find them; obviously they were evading service (see record) before this Court.

In *Anderson* v. *Hudspath Pine, Inc.*, (10 CA, 1962), 299 F. 2d 874, it was held: In passing on a motion for a directed verdict, court may not pass on weight of the evidence or determine where the preponderance of evidence lies. With the exception of clearly incredible evidence, court should not consider or pass on credibility of witnesses and should accept evidence in favor of party against whom motion for directed verdict is made. Undoubtedly this is the well established law and the Trial Court had no right to pass on it in this case, when clearly there was legally sufficient evidence to go to the jury, on the conflicting inferences of fact alone.

A fact-finder is not even compelled to believe the testimony of a witness even if such testimony is not contradicted (Power's Case, supra). In the *Sartor Case, supra*, this Court held: The mere fact that the witness is interested in the result of the suit *is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact*. Accordingly, the late Judge Chesnut did not have the right to pass on the credibility of witnesses—particularly Meatyard's testimony—when they were all interested in the results of the suit. Meatyard received for his clients about $12,000.00 from Christopher, that the Shroyers allowed to be paid as a reward for refusing to prosecute a criminal case in the District of Columbia that had been instituted against Shroyer for embezzlement of funds of the District Supply, Inc., a former employer.

III.—

THE ORIGINAL RECORDS IN THIS CASE ARE BEFORE THIS COURT AND THEY SHOW THE TRIAL COURT WAS DETERMINED TO END THE CASE, ABOUT FIVE O'CLOCK, ON APRIL 25, 1961, BY DIRECTING A VERDICT ON COUNTS IV, V AND VI, WHEN PETITIONER, REPRESENTING HIMSELF, WAS WORN DOWN AND VERY TIRED, AND JUDGE CHESNUT REFUSED TO ADJOURN OR CONTINUE THE CASE UNTIL THE NEXT DAY, WHEN PETITIONER HAD WITNESSES SUBPOENAED TO TESTIFY ON THE FOLLOWING DAY AT TEN (10) O'CLOCK (27th).

That ruling is most unreasonable—and extraordinary—and it shows the Trial Judge had made up his mind already.

at that time, to dispose of the case, by directing a verdict on these three counts, and not take any chance as to what a jury might do with it on the conflicting inferences of fact that was before it, throughout the entire case. This was horrible injustice—and not due process of law. This Petitioner was deprived not only of due process of law but also a jury trial (see Rule 38(a), FRCP) under the Constitution by the Trial Judge's capricious, willful, arbitrary and dogmatic action or inaction.

Since Judge Chesnut's demise took place on October 16, 1962, according to the report in the Washington Evening Star newspaper, at the ripe old age of 89, it is submitted that this high tribunal should take judicial notice of that fact and draw a reasonable conclusion, that his senility, at the trial of this case alone, warrants a review hereof—and a reversal for a new trial, in order that justice be done in this case and that the important questions of law be involved established for litigants henceforth.

IV.—

PETITIONER SHOULD HAVE HAD, OR SHOULD HAVE, ALL THE JUSTICES OF THIS COURT EXAMINE AND PASS UPON HIS CASE INVOLVING SUCH MATERIAL AND IMPORTANT QUESTIONS AS HAVE BEEN RAISED BY PETITIONER HEREIN

Obviously, this case was examined during the Summer Recess when most of the Justices were away on vacation. The Petition for Writ was Denied on October 8, 1962, and Mr. Justice Goldberg had, at that time, been a Justice for a week, at least, who did not participate, according to the record. Petitioner, therefore, feels and submits that he

should be given the benefit of a consideration and an examination of this case by all of the Justices, before a final judgment thereon is made. No Reply Briefs were filed by the Respondents in this case opposing this Petition for a Writ by Petitioner; Taylor and Doyle waived their right to reply. It is, therefore, assumed that all statements and arguments made by Petitioner therein for a Writ must be taken as true.

The *original records in this case* are before this Court and it is submitted that such records show plainly Petitioner has been deprived of a Jury Trial, on Counts IV, V and VI of his amended complaint by the late Judge Chesnut in directing a verdict thereon; and, further, that Petitioner has not been afforded fair and impartial hearings in this case before said FRCP Trial Judge as the Constitution requires (See Rule 38 FRCP). Great discrimination has been shown against Petitioner in this case by the Trial Court as above indicated, and *Due Process of Law* has not been accorded him. Petitioner should, therefore, be allowed to have all Justices of this Court examine and pass judgment on his Petition for a Writ of Certiorari.

V.—

For the above important reasons and grounds set forth—with briefs and records in file, if necessary—, Petitioner earnestly requests and submits that he be given a Reconsideration of, and a Rehearing on, the Order of October 8, 1962, DENYING his Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, by all of the Justices, in order that justice be done under the law and Constitution of the United States.

Respectfully submitted:

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(Phones: DI 7-2323; CO 5-4111)

NOTE: Emphasis added.
DATED: November 2, 1962.

CERTIFICATE OF COUNSEL

I hereby certify that the above Petition for a Rehearing on ORDER of October 8, 1962, DENYING Petition for a Writ of Certiorari in the above-entitled cause, is presented in good faith and not for delay; and that the same is restricted to the grounds specified in Rule 58(2) of this Court.

LUTHER ROBINSON MADDOX, *Pro Se,*